Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent of the Internal Revenue Service,
Petitioners

—v.—

LASALLE NATIONAL BANK and JOSEPH W. LANG,
Vice-President of the LaSalle National Bank

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 1977
CERTIORARI GRANTED DECEMBER 12, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent of the Internal Revenue Service,
Petitioners

—*v.*—

LASALLE NATIONAL BANK and JOSEPH W. LANG,
Vice-President of the LaSalle National Bank

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS

11-11-75 Filed petition to enforce Internal Revenue Summons.

11-11-75 Filed civil cover sheet. T

11-19-75 Enter order dated November 18, 1975: On motion of government, enter order to show cause why respondents should not be compelled to obey the Internal Revenue Service summons served upon them on August 15, 1975, by petitioner, Special Agent John F. Olivero, returnable on December 5, 1975 at 10:00 a.m. Petition and order to be served on or before November 25, 1975, with response to be filed 5 days after service. DRAFT—McGarr, J.
Mailed notices 11-19-75. T

11-19-75 Issued 2 certified copies of rule to show cause with 2 copies of petition to enforce IRS summons as to Joseph W. Lang and LaSalle National Bank. T

11-21-75 Filed appearance of LaSalle National Bank and Joseph W. Lang and that of Matt P. Cushner as attorney for said defendants. c

11-21-75 Filed affidavit of Matt P. Cushner pursuant to General Rule 39. c

11-24-75 Filed defendant's notice of taking deposition of Plaintiff John F. Olivero, Special Agent.

11-24-75 Filed defendant's notice of taking deposition of Thomas G. Wilmowski, Special Agent. c

11-26-75 Filed Plaintiff's motion for protective order and motion to quash subpoena.

11-26-75 Filed Defendants' motion to reset deposition of Special Agent Olivero, for an extension of time to respond to petition and to reset the hearing date.

DATE	PROCEEDINGS

12-1-75 Enter order dated November 26, 1975:

Deposition of Special Agent Olivero to be deferred. Hearing date to stand. Ruling on discovery is deferred until hearing on December 5, 1975 is completed—McGarr, J.

Mailed notices 12-1-75. c

11-28-75 Filed Marshal's return of Petition to Enforce IRS Summons, returned served on LaSalle National Bank.

11-28-75 Filed Marshal's return of Petition to enforce IRS summons, returned served on Joseph W. Lang, Vice President LaSalle, National Bank. Y

12-3-75 Filed Defendants' notice of motion to dismiss.

12-3-75 Filed Defendants' motion to dismiss.

12-3-75 Filed Defendants' memorandum in support of respondents' motion to dismiss.

12-4-75 Enter order dated December 3, 1975:

Leave given respondents to file motion to dismiss, with response to be filed by the afternoon of December 4, 1975. Hearing is reset from 10:00 a.m. on December 5, 1975 to 3:00 p.m.—McGarr, J.

Mailed notices 12-4-75. c

12-8-75 Enter order dated December 5, 1975.

Leave given Government to file opposition to respondents motion to dismiss. Motion to dismiss is denied. Arguments and evidence heard and concluded. John F. Olivero not to submit to deposition.

In camera inspection of petitioners documents to be made by Court. Parties to file simultaneously memorandum on December 17, 1975. Cause taken under advisement.—McGarr, J.

Mailed notices 12-8-75. Y

12-10-75 Filed Marshal's return of deposition subpoena returned served on Thomas G. Wilmowski, Special Agent.

DATE	PROCEEDINGS

12-10-75 Filed Marshal's return of deposition subpoena returned served on John F. Olivero. Y

12-12-75 Filed Defendants' answer. c

12-18-75 Enter order dated December 17, 1975:

Enter order granting parties an extension of time to file briefs to and including December 22, 1975.—McGarr, J.

Mailed notices 12-18-75. c

12-19-75 Clerk's file copy of transcript of proceedings had before Judge McGarr on December 5, 1975, filed by Official Court Reporter. (one volume) c

12-23-75 Filed Respondents' brief in opposition to enforcement of Internal Revenue Service summons.

12-24-75 Enter order dated December 23, 1975:

Motion to file respondents' brief in opposition to enforcement of Internal Revenue Service summons instanter is granted. Enter order.—McGarr, J.

Mailed notices 12-24-75. c

12-29-75 Filed Memorandum of Petitioners. U

12-30-75 Filed respondents notice of motion with motion to file reply Memorandum. Y

12-31-75 Enter order dated December 30, 1975.

Enter order: Respondents' motion for leave to file a reply Memorandum on or before January 9, 1976 is granted.—McGarr, J.

Mailed notices 12-31-75. Y

1-9-76 Filed respondents' reply to memorandum. c

3-10-75 Enter order dated March 9, 1976: Pursuant to memorandum opinion and order entered this day, the petition of the The United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent. LaSalle National Bank, is denied. Draft. McGarr, J.

Notices mailed 3-10-76. k

DATE	PROCEEDINGS
5-7-76	Filed plaintiff-appellants' notice of appeal. fd'a
5-7-76	Transmitted copy of notice of appeal and copy of docket entries to U.S.C.A. 7th Circuit. fd'a
5-7-76	Mailed copy of notice of appeal to Matt P. Cushner, 180 North LaSalle Street, Chicago, Illinois. fd'a

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

PETITION TO ENFORCE INTERNAL REVENUE SUMMONSES

Now come the United States of America and Special Agent John F. Olivero, Internal Revenue Service, by their attorney, Samuel K. Skinner, United States Attorney for the Northern District of Illinois, and show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C., §§ 7402(b) and 7604(a), to judicially enforce an Internal Revenue summons.

II

The petitioner, John F. Olivero, is a special agent of the Internal Revenue Service employed at Chicago, Illinois, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., § 7602.

III

The respondents, LaSalle National Bank and Joseph W. Lang, maintain an office within the jurisdiction of this Court at Chicago, Illinois.

IV

The petitioner, Special Agent John F. Olivero, is conducting an investigation of the federal tax liabilities for the years 1970, 1971 and 1972 of John Gattuso who resides at 1721 Sunset Ridge, Glenview, Illinois, within the jurisdiction of this Court.

V

The respondents, LaSalle National Bank and Joseph W. Lang, have books and records relating to the tax liabilities involved in the investigation referred to in paragraph IV above, and the respondents have knowledge thereof to which they can testify.

VI

On August 15, 1975, two Internal Revenue summonses were issued by the petitioner, Special Agent John F. Olivero, directing the respondent, LaSalle National Bank to appear before the petitioner, Special Agent John F. Olivero, at the offices of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois, on September 2, 1975, at 10:00 a.m. to testify and to produce for examination certain books, records and papers all as set forth in the attached affidavit and summonses. Attested copies of the summonses were personally served upon the respondents by the petitioner, Special Agent John F. Olivero, on August 15, 1975, by handing it to the respondent, Joseph W. Lang, at the office of LaSalle National Bank, Chicago, Illinois. Copies of the summonses issued to the respondents are attached hereto and incorporated herein as Exhibits A and B.

VII

The respondents appeared in response to the summonses issued to the LaSalle National Bank and described in paragraph VI above, but failed and refused to

testify or produce the books, records, and papers as demanded by the summonses, and such failure and refusal continues to the date of this petition.

VIII

The information contained in the documents not produced in accordance with the summonses is not in the possession of the petitioners.

IX

It was and now is essential to the determination of the tax liabilities of John Gattuso for the years 1970, 1971 and 1972, that the respondents be required to testify and produce the records demanded, as is evidenced by the affidavit of the petitioner, Special Agent John F. Olivero, attached hereto as Exhibit C and incorporated herein as part of this application.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondents, LaSalle National Bank and Joseph W. Lang, to show cause, if any they have, why they should not comply with and obey the aforementioned summonses in each and every requirement thereof.
2. That the Court enter an order directing the respondents, LaSalle National Bank and Joseph W. Lang, to obey the aforementioned summons and each and every requirement thereof, and ordering their attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons, before Special Agent John F. Olivero, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent John F. Olivero, or any other proper officer of the Internal Revenue Service.
3. That the United States recover its costs in maintaining this action.

4. That the Court render such other and further relief as is just and proper.

SAMUEL K. SKINNER
United States Attorney

By: _____
Assistant United States Attorney

EXHIBIT B

SUMMONS

Department of the Treasury

[SEAL]

Internal Revenue Service

In the matter of the tax liability of

JOHN GATTUSO
1721 Sunset Ridge
Glenview, Illinois 60025

Internal Revenue District of Chicago

Period(s) 1970 to 1972 inclusive

The Commissioner of Internal Revenue

To LA SALLE NATIONAL BANK

As Trustee for Trust No. 31544

At 135 South La Salle Street, Chicago, Illinois

Greetings: You are hereby summoned and required to appear before Special Agent JOHN F. OLIVERO an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Your files relating to Trust No. 31544 including the Trust Agreement and any changes thereto and assignments of the beneficial interest or power of direction in effect during the period January 1, 1970 through December 31, 1972. Also with respect to Trust No. 31544 all deeds, options, correspondence, closing statements and sellers statements, escrows, and tax bills pertaining to all property held in the trust at any time during the period January 1, 1970 through December 31, 1972.

Place and time for appearance: at IRS, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois on the 2nd day of September, 1975 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 15th day of August, 1975

Original

/s/ John F. Olivero
Signature
Special Agent 353-3330
Title

[SEAL]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
August 15, 1975	3:37 p.m.

How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed

/s/ Joseph W. Lang
Vice President

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

---

Signature	Title
John F. Olivero	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production

of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

EXHIBIT A

SUMMONS

Department of the Treasury

[SEAL]

Internal Revenue Service

In the matter of the tax liability of

JOHN GATTUSO
1721 Sunset Ridge
Glenview, Illinois 60025

Internal Revenue District of Chicago

Period(s) 1970 to 1972 inclusive

The Commissioner of Internal Revenue

To LA SALLE NATIONAL BANK
As Trustee for Trust No. 35396

At 135 South La Salle Street, Chicago, Illinois

Greetings: You are hereby summoned and required to appear before Special Agent JOHN F. OLIVERO an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Your files relating to Trust No. 35396 including the Trust Agreement and any changes thereto and assignments of the beneficial interest or power of direction in effect during the period January 1, 1970 through December 31, 1972. Also with respect to Trust No. 35396 all deeds, options, correspondence, closing statements and sellers statements, escrows, and tax bills pertaining to all property held in the trust at any time during the period January 1, 1970 through December 31, 1972.

Place and time for appearance: at IRS, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois

on the 2nd day of September, 1975 at 10:00 o'clock A.M. Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 15th day of August, 1975

Original

/s/ John F. Olivero
Signature
Special Agent 353-3330
Title

[SEAL]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue Code

I certify that I served the summons shown on the front of this form on:

Date	Time
August 15, 1975	3:37 p.m.

How Summons Was Served:

☒ I handed an attested copy of the summons to the person to whom it was directed

/s/ Joseph W. Lang
Vice President

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

---

Signature	Title
John F. Olivero	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(e)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production

of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

AFFIDAVIT

JOHN F. OLIVERO, a petitioner herein, being first duly sworn, deposes and says:

1. That he is a duly commissioned special agent of the Intelligence Division of the Internal Revenue Service with post of duty in Chicago, Illinois, and performing his duties under the District Director of Internal Revenue, Chicago, Illinois.

2. That in his capacity as a special agent he is assigned to investigate the tax liabilities of John Gattuso of Glenview, Illinois, for the calendar years 1970, 1971 and 1972.

3. That pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, 26 U.S.C., §§ 7602 and 7603, two summonses, Treasury Form 2039 were served upon LaSalle National Bank and Joseph W. Lang on August 15, 1975, by your affiant personally handing attested copies of the summonses to Joseph W. Lang at the offices of LaSalle National Bank, Chicago, Illinois. The summonses, copies of which are attached as Exhibits A and B to this application and made a part hereof, directed the respondent, LaSalle National Bank, to appear before your affiant on September 2, 1975, at 10:00 a.m. at the offices of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn, Chicago, Illinois, then and there to

give testimony and produce records relating to the tax liabilities of John Gattuso for the years 1970, 1971 and 1972.

4. That the respondents, LaSalle National Bank and Joseph W. Lang, appeared in response to the summonses described in paragraph 3 above, but failed and refused to testify and to produce the books, records and papers as demanded by the summonses, and such failure and refusal continues to the date of this affidavit.

5. That the testimony and records demanded by the summonses served upon the respondents are relevant and necessary for the determination of the tax liabilities of John Gattuso for the years 1970, 1971 and 1972.

6. That the information contained in said documents is not in the possession of petitioners.

_____

JOHN F. OLIVERO
Special Agent,
Intelligence Division
Internal Revenue Service

Sworn to and subscribed before me this —— day of ————————, 1975.

_____

Notary Public

My commission expires: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

ORDER TO SHOW CAUSE

Upon the petition, the exhibit attached thereto, the affidavit of Special Agent John F. Olivero, Internal Revenue Service, and upon the motion of Samuel K. Skinner, United States Attorney for the Northern District of Illinois, it is

ORDERED, that LaSalle National Bank and Joseph W. Lang, appear before the United States District Court for the Northern District of Illinois, in that branch thereof presided over by the undersigned, on the ——day of ————————, 1975, at ——— —.m., to show cause why they should not be compelled to obey the Internal Revenue Service summonses served upon them on August 15, 1975. It is further

ORDERED, that a copy of this order, together with the Petition and Exhibits thereto, be served upon LaSalle National Bank and Joseph W. Lang on or before the ——day of ————————, 1975. It is further

ORDERED, that the respondents shall file a written response to the petition within five (5) days after service of the petition upon them.

DATED at Chicago, Illinois, this —— day of ————, 1975.

_____

United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA and JOHN F. OLIVERO, Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

ANSWER

NOW COME the respondents, LaSalle National Bank and Joseph W. Lang, by their attorney, Matt P. Cushner, in answer to the Petition herein states as follows:

I

That if jurisdiction exists at all, it exists pursuant to Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954.

II

The respondents do not have sufficient information to affirm or deny the allegations contained in Paragraph 2, of the Petition herein, and therefore denies them.

III

The respondents admit the allegations contained in Paragraph 3 of the Petition.

IV

The respondents do not have sufficient information to admit or deny the allegations contained in Paragraph 4 of the Petition herein, and therefore, denies them.

V

The respondents deny the allegations contained in Paragraph 5 of the Petition.

VI

The respondents admit that on August 15, 1975, two Internal Revenue summonses were served on the respondents requiring them to appear before Special Agent John F. Olivero at the office of the Internal Revenue Service, Intelligence Division, Room 2500, 230 South Dearborn Street, Chicago, Illinois on September 2, 1975 at 10:00 a.m. The respondents deny all other allegations contained in Paragraph 6 of the Petition.

VII

The respondents admit that they appeared in response to the summonses issued herein in full accordance with all laws and regulations pertaining thereto. Respondents deny any and all other allegations contained in Paragraph 7 of the Petition.

VIII

Respondents deny each and every allegation contained in Paragraph 8 of the Petition.

IX

Respondents deny each and every allegation contained in Paragraph 9 of the Petition.

WHEREFORE, the respondents respectfully pray:

1. That this court enter an Order dismissing the Petition herein with prejudice, with all costs to the respondents.
2. That this court enter an Order directing the petitioners to pay all witness fees as required by Title 5, U.S.C. Section 503.
3. That this court enter an Order granting attorney's fees to the respondents herein.

4. That this court render such other and further releases as is just and proper.

LaSalle National Bank and
Joseph Lang, Vice President

By Matt P. Cushner
MATT P. CUSHNER

PEDERSEN & HOUPT
180 North LaSalle Street
Suite 3400
Chicago, Illinois 60601
641-6888

AFFIDAVIT OF MAILING

I, HORTENSE M. ROSS, being first duly sworn on oath, depose and say that I served the foregoing Answer by mailing a true and correct copy of same to:

Stan Kubacki
U.S. Attorney's Office
219 South Dearborn Street
Chicago, Illinois 60602

Joseph Gontram
Tax Division
Department of Justice
Washington, D.C.

with proper postage prepaid, and depositing same in the U.S. mail chute located at 180 North LaSalle Street, Chicago, Illinois 60601, at the hour of approximately 5:00 p.m. on the 12th day of December, 1975.

/s/ Hortense M. Ross,

[SEAL]

SUBSCRIBED and SWORN TO
before me this 12th day
of December, 1975.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA and JOHN F. OLIVERO,
Special Agent, Internal Revenue Service, PETITIONERS

v.

LASALLE NATIONAL BANK and JOSEPH W. LANG, Vice-President of LaSalle National Bank, RESPONDENTS

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE FRANK J. MC GARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on December 5, 1975, at the hour of 3:30 o'clock p.m..

PRESENT:

HON. SAMUEL K. SKINNER,
United States Attorney
(219 South Dearborn Street, 15th Floor,
Chicago, Illinois, 60604), by
MR. ROBERT A. FILPI and
MR. JOSEPH GONTRAM,
Assistant United States Attorneys,

appeared on behalf of the Government;

MESSRS. PEDERSEN & HOUPT
(180 North LaSalle Street, Room 3400,
Chicago, Illinois, 60601), by
MR. MATT P. CUSHNER and
MR. GREGORY J. PERRY,

appeared on behalf of the respondents.

[2] THE CLERK: 75 C 3842, United States versus LaSalle National Bank.

THE COURT: Gentlemen, gather around up here and give me a status report.

THE CLERK: A return on an order to show cause why respondent should not be compelled to obey and turn over Revenue Service summons.

MR. FILPI: Good afternoon. I would like to introduce Mr. Gontram from the Department of Justice, Tax Division in Washington D.C. on behalf of the Government's case.

THE COURT: How do you do, sir.

Mr. Cushner—

MR. CUSHNER: Good afternoon.

THE COURT: Do I understand that you have what, how many witnesses that you think we ought to hear.

MR. CUSHNER: I have only one witness, your Honor.

THE COURT: I think what we should do, because we are getting a late start, and to serve the convenience of the witnesses, just put them on, get on the record whatever you think they should say and then if we have to go a little late in argument we will work it out.

MR. CUSHNER: Fine. I believe before we go to the witnesses though we have a pending Rule 12 motion which I understand your Honor was reserving decision on until today. I understand the government have not filed a [3] response to my motion. I would like to argue it, I assume the government would—

MR. GONTRAM: Your Honor, through an advertence the opposition was not filed. I have the original here to be filed.

MR. CUSHNER: Your Honor, I will object to the filing of this. I made a special call specifically to the U.S. Attorneys office yesterday to inquire whether any response was to be filed on Thursday, which is the day in which your Honor agreed to let him respond. Your Honor, they indicated to me that no response would be filed by the government. This catches me totally by surprise. I am not prepared to answer whatever allegations or law may be contained in this motion. I think that that motion

should be considered before the witnesses are put on. I would like an opportunity to examine this and to reply to it.

MR. GONTRAM: Your Honor, if I may briefly reply to that. The opposition is one page and it is simply, directly responsive to the motion filed by the respondent. I do not believe that this type of an opposition could possibly be taken by surprise.

MR. CUSHNER: This one page could have been filed yesterday and I assume anything could be filed would be in response to my motion, I don't think that that should change the situation.

[4] THE COURT: We are talking about how many witnesses, just Mr. Lang, or are there others?

MR. GONTRAM: The government, your Honor, would like to put on Special Agent Olivero initially.

THE COURT: I am talking about the motion to dismiss. That has to do with the failure of the government to tender along with the summons on Joseph Lang, the vice president of the LaSalle National Bank, the appropriate witness fees and mileage fees—is that the only witness?

MR. CUSHNER: No, your Honor, we didn't put him on. I didn't think there was going to be any controversy over the fact that witness fees have never been tendered, unless the government feels that that is—

THE COURT: If that is the basis for the motion—

MR. CUSHNER: That is correct.

THE COURT: That on that sole basis—

MR. GONTRAM: I don't believe there are any factual contentions with respect to that.

THE COURT: All right, the government did not tender the witness fees—

MR. GONTRAM: That is correct.

THE COURT: All right, I doubt—I think the government should have obviously but I doubt it is an adequate basis for a dismissal of the action. So I will deny the motion in that regard, whether Mr. Lang is here or not or whether [5] he should be is something else again, but in the meantime, the motion to dismiss is denied.

Let's go forward with the witnesses we have here and then I will hear you on the totality of the issues.

Who do you want to put on first?

MR. GONTRAM: Special Agent Olivero, who is the petitioner in this case.

THE COURT: Call him.

Mr. Olivero, would you take the stand, please.

(Witness duly sworn.)

JOHN F. OLIVERO,

called by the government as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GONTRAM:

Q Will you state your name, please, sir?
A John Olivero.
Q By whom are you employed?
A The Internal Revenue Service.
Q In what capacity?
A Special Agent.
Q How long have you been employed as a Special Agent?
A Approximately 16 years.
Q In your capacity as a Special Agent, were you [6] assigned to investigate John Gattuso?
A Yes.
Q Would you describe the purpose of that investigation?
A To determine the tax liabilities for the years under investigation.

MR. CUSHNER: Your Honor, I will object to the question, it is calling for a conclusion. If he would ask him what he was told in the assignment I would have no objection. He is asking the witness to characterize the investigation.

THE COURT: We don't have a jury Mr. Cushner, while it is an appropriate objection I don't think we need be that technical for purposes of a bench trial, so it is overruled. Go ahead.

BY MR. GONTRAM:

Q Mr. Olivero, would you describe your focus as a Special Agent in this investigation?
A To investigate the possibility of criminal violations of the Internal Revenue Code.
Q Were you conducting this investigation on August 15, of 1975?
A Yes, sir.
Q What tax years are involved in your investigation?
A 1970, 1971 and 1972.
[7] Q During the course of this investigation did you determine that it was necessary to obtain testimony and documents from the LaSalle National Bank with respect to John Gattuso?

MR. CUSHNER: Objection your Honor. I believe again this calls for a conclusion of the witness. If he would like to ask the witness what it is that he did in conducting this investigation, what led him to ask for these records, I would have no objection. He is skipping over very important parts.

MR. GONTRAM: I will get into that.

THE COURT: He went to LaSalle National Bank, whether he determined he should go or just went doesn't seem to be too relevant. Go ahead.

BY MR. GONTRAM:

Q What caused you to decide to obtain testimony and documents from LaSalle National Bank?
A The income tax returns of the taxpayer disclosed rental income from real property. Then it was necessary to go to LaSalle Bank, who has custody of the trust files to obtain those documents to determine the accuracy of the items reported.

THE COURT: Was the property identified as being held in trust and owned by the LaSalle National Bank, is that why you went?

THE WITNESS: Yes, sir.

[8] THE COURT: I am trying to figure out why you connected the LaSalle National Bank with this property.

THE WITNESS: It was determined that LaSalle National Bank did have custody of the trust file.

THE COURT: All right, go ahead.

MR. GONTRAM: Mr. Reporter will you please mark these as Petitioner's Exhibits 1 and 2.

(Whereupon, said documents were marked as Petitioner's Exhibit Nos. 1 and 2 for identification.)

BY MR. GONTRAM:

Q Mr. Olivero, would you please examine two documents marked as Petitioner's Exhibits 1 and 2.

Can you identify those documents?

A Yes, sir.

Q What are they?

A These documents are summons prepared at my direction, served upon the LaSalle National Bank calling for specific trust files. These documents were served on the LaSalle National Bank on August 15th of 1975, returnable on September 2, 1975, and served upon Joseph W. Lang, Vice President, on August 15, 1975.

Q By whom were they served?

A By me.

Q Is that your signature on each of those [9] documents?

A Yes, sir, it is.

Q Will you state the return date in the summons, of both summonses, that is Petitioner's Exhibits 1 and 2, was it September 2 of 1975?

A That is correct.

Q What if anything occurred on September 2 of 1975?

A Mr. Cushner, I believe, to the best of my recollection, Mr. Cushner called me and asked if we couldn't meet at the LaSalle National Bank for the return of

the service on the summons—rather at the Intelligence Division office. I agreed. I appeared at the LaSalle National Bank, and was told by Mr. Lang, that the bank would not turn over the records pursuant to the direction of Mr. Cushner.

Q Had you been informed prior to this time why LaSalle National Bank was not going to comply with this summons?

A On a previous occasion Mr. Cushner told me that one of the reasons he wasn't going to have the bank comply with the summons is that he is buying time, and on this occasion he said he thought it was an improper summons.

MR. CUSHNER: Objection to this testimony. He failed to state on what occasion, the time, the date, the place, who was present at the conversation—I [10] object to the testimony.

THE COURT: I will overrule the objection if he will lay that foundation, counsel.

BY MR. GONTRAM:

Q On what occasion was the statement made?

A The LaSalle National Bank was served with two other summons on a previous date, and the time for which the summonses would be returned, I believe, that was the time which Mr. Cushner—

THE COURT: Where was it that you had this conversation with Mr. Cushner, who else was present, and to the best of your recollection what date was it, on or about what date—first, was it in person or by phone?

THE WITNESS: No, it was in person.

THE COURT: Where was it?

THE WITNESS: It was in the office of the Intelligence Division, and it was on, I believe the date subsequent to the time that the first summons was issued.

THE COURT: Prior to the return date—in other words, what I am asking is, that sometime between August 15, '75 and September 2, '75—

THE WITNESS: Yes, sir, I believe it was.

THE COURT: Go ahead.

[11] BY MR. GONTRAM:

Q Mr. Olivero, had you completed your investigation of John Gattuso on August 15, 1975?
A No, sir.
Q Have you completed it at the present time?
A No, sir.
Q When you do complete a investigation, do you make recommendations as to whether further action may be warranted?
A Yes, sir.
Q What are the possible recommendations that you can make in an investigation of this type?
MR. CUSHNER: Your Honor, I object to this. I fail to see the relevance of his hypothetical question as to what recommendations the Special Agent may or may not make.
THE COURT: Well, I don't see how it helps, counsel. I will sustain the objection.
The fact is, you have not completed the Gattuso investigation and you are still awaiting these records.
THE WITNESS: That is correct.
THE COURT: Anything else, counsel?

BY MR. GONTRAM:

Q Have you at anytime made a recommendation that John Gattuso be recommended for criminal prosecution?
[12] A No.
Q Has the Internal Revenue Service made such a recommendation?
A No, sir.
Q Are the documents and testimony that you seek that are sought by the summonses in this case necessary to ascertain an accurate statement of the tax liabilities of John Gattuso?
MR. CUSHNER: I object to that question, your Honor. It is again asking for a conclusion of this witness.
MR. GONTRAM: Your Honor, this is not a conclusion.

MR. CUSHNER: He is asking the witness if these are necessary, if they are necessary let him explain how they are necessary.
THE COURT: He may answer.
Do you feel they are necessary?
THE WITNESS: Yes, sir.
THE COURT: You made the determination in your own mind as to whether to recommend criminal prosecution?
THE WITNESS: No, sir.

BY MR. GONTRAM:

Q Do you presently have the documents and testimony that are called for by the summonses?
A No, sir.
MR. GONTRAM: Thank you.

[13] CROSS EXAMINATION

BY MR. CUSHNER:

Q Special Agent Olivero, you testified that you had a conversation with me sometime before the returns dated for the third summons, is that correct?
A Yes, sir.
Q You say that conversation took place in the Intelligence Division, your offices in the Intelligence Division?
A I said to the best of my recollection—as I reflect now I believe it took place in your office.
Q Who was present at that conversation?
A Mr. Perry, yourself, another Special Agent and myself.
Q Can you tell the Court why three separate summonses, three separate sets of two summons apiece had been issued to LaSalle National Bank for the same records?
A Yes, sir. The first set of summonses called for years which were not under investigation. The second set of summonses had an incorrect date in the body of the summons and the third set of summonses were issued to perfect those two years.

Q On whose instructions was the first set of summonses issued?

A I issued the summonses.

[14] A I had them prepared.

Q What years did they ask for?

A The years 1970 to 1974, inclusive.

Q 1973 and 1974 were not under investigation, why did you ask for those years?

A Just as a matter of formality.

Q What formality were you complying with?

A To bring the information up to date.

Q You served the summonses in the year 1975, why did you not ask for the records concerning the year 1975?

A I believe the year 1975, for tax purposes, is not completely closed.

Q Do you recall on the occasion upon which you went to the bank to get a return on the first summons, whether or not the bank showed you a letter addressed to the bank that was authored by me?

A I don't recall.

Q Do you recall taking that letter back to your files?

A I might have.

MR. CUSHNER: Will you mark this as Respondent's Exhibit A, please.

(Whereupon, said document was marked as Respondent's Exhibit A for identification.)

[15] BY MR. CUSHNER:

Q I show you what has been marked for identification purposes as Respondent's Exhibit A and ask you if you have ever seen that letter?

A It looks familiar.

Q Will you read that letter to the Court?

A "July 1, 1973. Mr. Ken Marks, Land Trust Department LaSalle National Bank, Room 311, 135 South LaSalle Street, Chicago, Illinois 60603.

"Dear Mr. Marks: We have been retained by Mr. John Gattuso. It is our understanding that LaSalle National Bank has been issued a summons by the Internal Revenue Service requesting that the bank produce for inspection some or all of the records related to John

Gattuso and/or land trusts of which he may be a beneficiary. It is our opinion that such Summons is improper on its face, has been improperly issued and has been issued for improper purpose. In view of the foregoing defects, we instruct the bank to refuse to produce any records or give any testimony pursuant to this Summons and to request that the Internal Revenue Service seek judicial enforcement.

"I understand that this letter will be sufficient to assure such action by the bank and if for any reason anything additional is necessary please notify [16] me immediately.

"Yours very truly."

Q Did I ask him not to turn over the records in order to delay this investigation, or did I ask him not to turn it over because your summons wasn't any good?

A I said that on previous occasion you told me—

Q Just answer my question, Special Agent.

THE COURT: I understand what the letter says, so the witness doesn't have to answer that.

Mr. Cushner, I don't challenge bonafideness of your attack on the summons, don't worry about the remark that was attributed to you which may or may not have been said, it doesn't make a bit of difference anyway. Let's get on with the issue, it is either a valid summons or it isn't.

BY MR. CUSHNER:

Q Would you tell us when you were first assigned to investigate the tax liability of John Gattuso?

A In May of 1975.

Q Who gave you that assignment?

A My supervisor.

Q Who is your supervisor?

A At that time it was Mr. John McDermott.

Q What was the nature of your assignment?

A To investigate the possibility of any criminal [17] violations of the Internal Revenue Code.

Q At the time that you were given the assignment, were you told the source of the assignment?

A I don't quite understand the question.
Q Did it come out of audit?
A No, sir.
Q Did it come out of collection?
A No, sir.
Q Did it come out of an informant?
A In part.
Q What was the name of that informant?
MR. GONTRAM: Objection your Honor, it has no relevancy.
THE COURT: The objection is sustained.

BY MR. CUSHNER:

Q What was the information that had been received from the informant?
THE COURT: I think we have to assume, Mr. Cushner, that whatever else may or may not be true there was an investigation of certain years for the taxpayer being handled by this agent, which was opened prior to the date of this summons. Now how it got started doesn't seem to make a lot of difference.
MR. CUSHNER: I think if we can show the growth of this investigation from other agencies, the criminal [18] purpose of this investigation, grand jury subpoena, a search warrant may have issued, that that would certainly reflect on the propriety of the summons being issued this late in the investigation. Perhaps the frustration of other agents or agencies has turned them to the IRS to issue it hoping the Court will enforce it. That is why we have to get into it. We haven't been allowed to depose this witness, we have to make our case on cross examination.
THE COURT: The identity of the informant may be revealed by the direct question, or it is the nature of the information is what I am saying is not relevant. The rest of this I am not ruling on. If the informant was a grand jury recommendation that is one thing. But if the informant is some person whose confidentiality ought to be respected I would like to respect it. That is the whole purpose of my ruling.

MR. CUSHNER: I can understand, having to do without the name of the informant, but certainly if the information is not the type that would reveal the name of the informant or his identity—
THE COURT: Was this case referred to the IRS, if you know, by some other Federal Investigative Agency?
THE WITNESS: No, the investigation was asked [19] for and initiated by information that I obtained and submitted to the Internal Revenue Service.
THE COURT: This was yours from start to finish?
THE WITNESS: Yes, sir.
THE COURT: You obtained that information in part from an informant?
THE WITNESS: Yes, sir.
THE COURT: And in other parts where did you get it?
THE WITNESS: From another taxpayer.
THE COURT: You mean from a return of another taxpayer?
THE WITNESS: From another investigation, sir.
THE COURT: Go ahead.

BY MR. CUSHNER:

Q This person, this informer who gave you information about Mr. Gattuso, did he volunteer that information or did you ask that informant about Mr. Gattuso?
A The information was volunteered.
Q Prior to that information being volunteered, had you ever heard of Mr. Gattuso?
A Yes, sir.
Q How had you heard of him prior to that information?
A Through the other investigation.
Q Has that investigation been concluded?
[20] A Yes, sir.
Q How did that investigation end?
MR. GONTRAM: I object your Honor that is entirely irrelevant.
THE COURT: The general answer, did this result in a criminal reference, or not?
THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Did it not result in a criminal reference because of the information given concerning Mr. Gattuso?

A No, sir.

Q Had you ever participated in any other investigation directly or indirectly of Mr. Gattuso before this present one?

A No, sir.

Q Have you ever been contacted by the Federal Bureau of Investigation with respect to Mr. Gattuso?

A Yes, sir.

Q On what occasion or occasions were you contacted by the FBI with respect to Mr. Gattuso?

THE COURT: Was this after the beginning of your investigation here or was it one of the factors that precipitated the beginning of your investigation?

THE WITNESS: It goes back to the other investigation, your Honor.

[21] THE COURT: It is complicated.

THE WITNESS: Yes.

THE COURT: All right, so you had a discussion with an agent of the FBI, I assume, concerning Mr. Gattuso during the course of the earlier investigation of the other tax matter?

THE WITNESS: That is correct.

THE COURT: So that at least was knowledge known to you, whatever that discussion was, at the time that you decided to open a file on Mr. Gattuso?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

BY MR. CUSHNER:

Q To the best of your recollection what was the conversation that you had with that FBI Agent, what did he say to you, what did you say to him, who was present and what date did it take place?

MR. GONTRAM: I object, your Honor.

THE COURT: I will sustain the objection.

MR. CUSHNER: On the basis that it is irrelevant, your Honor.

THE COURT: Yes.

BY MR. CUSHNER:

Q Other than the information you received from the informant and the FBI, what other sources of information [22] have you had with respect to this investigation?

A I received some information from the Cosmopolitan National Bank.

THE COURT: Was that as the result of your inquiry?

THE WITNESS: Yes, sir, I served a summons upon the Cosmopolitan Bank and they supplied me with certain records. I received some information from HUD.

THE COURT: Was that as a result of your inquiry?

THE WITNESS: Yes, sir.

THE COURT: Anywhere else?

THE WITNESS: From the office of the United States Attorney. And from another department within the Internal Revenue Service.

THE COURT: Were all of these information that you obtained after you initiated requests—

THE WITNESS: Yes, sir.

BY MR. CUSHNER:

Q And all after the commencement of your opening of the file on this taxpayer?

A Yes, sir.

Q What caused you to contact HUD?

A From information that I have obtained during the course of the investigation indicated that Mr. Gattuso had contacted HUD, so I sought to see why Mr. Gattuso contacted HUD.

[23] Q Where did you receive that information?

A I believe it was in the documents that were with the Cosmopolitan National Bank.

Q What information did you receive from HUD?

A At the present time I believe I only received one document.

Q What is that document?

MR. GONTRAM: Your Honor, I object. There is no relevance to this issue. If counsel is trying to attack the purpose of the summons this does not have any bearing on that.

MR. CUSHNER: It is the type of material that this man is gathering.

THE COURT: Well the bonafideness of the investigation and whether or not it was at that time a focus criminal investigation are the issues here. But I think we have to respect to some extent the information gathering system and the confidentiality that goes with it, and what type of information the Agent's got. I would guess, as an investigating agent, he can chase down every lead in every alley he cares to and some may be relevant and some may not. Some may be important and some may be trivial and some may be embarrassing. I don't think we have to go into all of that. So I will sustain [24] the objection.

MR. CUSHNER: Can I inquire your Honor into the authorship of the documents that he receives, if they were authored by the taxpayer?

THE COURT: The document from the Cosmopolitan, what do you remember about it, was it a letter?

MR. CUSHNER: Your Honor, I have the document he received from the Cosmopolitan, I am concerned about what he received from HUD.

BY MR. CUSHNER:

Q Were they authored by the taxpayer, the document you received from HUD?

A To the best of my recollection it was one document, but as I reflect I believe the document was to HUD from the Cosmopolitan Bank.

Q All right, you said you contacted the U.S. Attorneys' office. Who did you contact at the U.S. Attorneys' office?

A I believe it was a special representative of the Secret Service.

Q Do you recall his name?

A Yes, sir.

Q What is his name?

A John Cozza.

Q What led you to contact John Cozza?

[25] A In the normal course of our investigation we speak to other agents to see whether there are any files and it so happened that Mr. Cozza did have a document relating to John Gattuso.

Q Did you make specific inquiry to Secret Service requesting any information they may have on John Gattuso?

A No, sir.

Q How did you happen upon this file that Mr. Gattuso possessed?

A I believe in general conversation with him.

Q What did the file contain?

A One letter.

Q Was it authored by John Gattuso?

A No, sir.

Q You said you have received other files from other departments of the Internal Revenue Service. What other departments in the Internal Revenue Service provided you with information?

A The Revenue Service office of the Internal Revenue Service, the collection division.

Q The collection division, and who in the collection division did you receive files from?

A Mr. Lieberman.

Q Do you recall Mr. Lieberman's first name?

[26] A I believe it is George Lieberman.

Q Do you recall what office he worked out of?

A Yes, the Northwest Area Office on Kedzie Avenue.

Q What led you to Mr. Lieberman?

A For purposes of control, the Intelligence Division sends to the service center a request of any activity on the taxpayer be held in abeyance pending the result of the Intelligence Division's investigation, and that if there is anything, any action on the taxpayer, we are so notified. I was so notified that there was an outstanding tax liability for Mr. Gattuso, so I contacted Mr. Lieberman.

Q Do you recall for what year that outstanding tax liability was for?

A I believe it was for 1972 and 1973.

Q Is that as a result of an audit that had been previously conducted as to the year 1972?

A I don't think so.

Q Do you recall if the files indicated that a previous audit had been conducted in the year 1972?

A No.

Q Did the files you received from Mr. Lieberman indicate any documents that were authored by John Gattuso?

A Yes, sir.

Q What documents were those?

A Financial statements submitted to Mr. Gattuso [27] in response to his ability to pay the outstanding tax liability. And some cancelled checks—excuse me, I don't know whether they are cancelled or not, some checks.

Q Is the investigation that you are presently conducting with respect to John Gattuso related to any other investigation presently being undertaken by either you or anyone else in the Intelligence Division?

A Not to my knowledge.

Q Is this an investigation that involves anybody other than John Gattuso?

A Not to my knowledge.

Q Have you or any other agent authored any preliminary reports with respect to this investigation?

A I don't understand.

Q Have you authored any preliminary reports with respect to your investigation?

A No investigative reports, no.

Q Do you understand the term, preliminary report?

A Preliminary investigative report, yes, sir.

Q Have you authored one?

A No. sir.

Q Have you authored any final reports with respect to this investigation?

A No, sir.

Q Who is your supervisor at present?

[28] A The supervisor is an acting individual by the name of Chester Romaniak.

Q Spell the last name, if you know it?

A I believe it is R-o-m-a-n-i-a-k.

Q Did he become your supervisor after Mr. McDermott retired from the service?

A He was appointed as an acting supervisor, yes, sir.

Q Has there been any supervisors between Mr. McDermott being your supervisor and Mr. Romaniak becoming your supervisor?

A There could have been one for one day or so, but not for any length of time.

Q Have you ever seen a memorandum, log book, notes, or correspondence, that would indicate whether Mr. Gattuso was electronically or mechanically surveyed at anytime by the Federal Government?

A No, sir.

Q Have you ever mechanically or electronically surveiled Mr. Gattuso?

A No, sir.

Q Did you receive any information from the FBI that the FBI wire tapped Mr. Gattuso?

MR. GONTRAM: Your Honor, I object to this line of questioning. It is irrelevant to the enforcement [29] of the Internal Revenue Service summons.

THE COURT: Well, we are down the path now, I assume this is the last question. You may answer that.

Do you have any information to that effect?

THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Have you discussed any or all of the findings that you have so far with your supervisor?

A Intermittantly I have discussed the progress of the investigation, yes.

Q Did you discuss it with Mr. McDermott?

A Yes, sir.

Q Have you discussed it with Mr. Romaniak?
A Not in detail, no.
Q Did you author memorandums concerning discussions with those gentlemen?
A No, sir.

[30] BY MR. CUSHNER:

Q Now, do you maintain a chronological work sheet?
A No, sir.
Q Have you ever maintained a chronological work sheet?
A Years past, yes, sir.
Q Why do you no longer maintain a chronological work sheet?
A Because we're not compelled to.
Q Do you have a manual handbook and have you read that manual handbook, No. 28?
A Not entirely, no, sir.
Q Are you familiar with the handbook for Special Agents in the Intelligence Division?
A Yes, sir, in part.
Q Is that the handbook offered by the Internal Revenue Service that is directed to the Intelligence Division Agents with respect to how they are to conduct investigations?
A Basically, yes, sir, then supplemented by directives.
Q Do you know whether that book requires you to have a chronological work sheet of your activities?
A I don't have any specific reference, no, sir.
Q Do you recall ever reading that you were supposed [31] keep a chronological work sheet?
A I recall being told the time I was compelled to keep one, but not at this particular time.
Q Do you recall being told that you were to selectively keep a chronological work sheet, or that you were to keep a chronological work sheet?
A Selectively told.
Q Have you ever read the handbook?
A When it's necessary, yes.

Q My question was, have you ever read the handbook?
MR. GONTRAM: Objection, your Honor.
THE COURT: The answer may stand.

BY MR. CUSHNER:

Q If the handbook instructed you to keep a chronological work sheet, would you do so?
A Not if the home ground rules didn't require it, no, sir.
Q What do you mean by "home ground rules", are those published anywhere?
A I take my orders from my immediate superiors and in direct line with the chief of the Intelligence Division. If he so directs that a chrononogical work sheet is not necessary then I'm not compelled to keep one and I won't.
Q Have you been so instructed by the group chief [32] not to keep a chronological work sheet?
A I have not been instructed to keep one.
Q If this book calls for you to keep one would you keep it unless instructed to the contrary?
THE COURT: Mr. Cushner, basically I think you've made your point. The issue is not whether the Agent should have, but whether he did.
Read the section to him, and to me, that says he should and then you can ask him a final question.

BY MR. CUSHNER:

Q Reading from Section 539 of the Internal Revenue Handbook No. 28, Handbook for Special Agents of the Intelligence Division.

> "Chronological work sheets. Special Agents will maintain a chronological work sheet, Form 4365 which requires the recording of sources, dates and other circumstances involved in obtaining of leads and evidence in investigations. Completed Form 4365 for investigation should be maintained as a

permanent part of the district case file. Exhibit 500-15 is an example of the chronological work sheet."

Do you recall ever reading that?

A I might have read it, I don't specifically recall at this time.

THE COURT: Did you keep any such chronological [33] work sheet in connection with the investigation of the tax liability of John Gattuso?

THE WITNESS: No, sir.

BY MR. CUSHNER:

Q Have you, to your knowledge, or any other Federal Agents or employees ever maintained any surveillance on Mr. Gattuso?

A I have not and I don't have any knowledge of any other investigator.

Q In any of the files which you have reviewed which have been provided by other agents, did they indicate that surveillance was ever had on Mr. Gattuso?

A I don't specifically recall that.

Q Have you, on any occasion whatsoever, seen any or all of the documents which are now requested from the LaSalle National Bank?

A I can't recall.

Q Could you have?

A I might have seen part or some indications of the documents.

Q Where might you have seen those?

A Mr. Lieberman's hand.

Q What documents might you have seen that Mr. Lieberman might have shown you?

A He might have shown me the financial statements [34] upon which the identification of the trust in the hands of the LaSalle National Bank was identified.

Q Your summons refers specifically to two specific trust numbers.

A That's correct.

Q Could you tell me how you got those numbers?

MR. GONTRAM: I object, your Honor. We've gone through this testimony before.

THE COURT: I don't recall that, you may answer.

BY THE WITNESS:

A It was on the financial statements submitted by Mr. Gattuso to Mr. Lieberman.

BY MR. CUSHNER:

Q Would you have seen them anywhere else?

A No, sir, not to the best of my recollection.

Q Have you ever ordered, or your yourself caused to have a tract search done?

A I have not, no, sir.

Q Have you checked the land title records?

A In our office, yes, sir. The identity of the land—

THE COURT: The question is what title records did you check. Did you check over the County Building and check the County Land Title Records?

THE WITNESS: I checked the land records for [35] purposes of identifying the real estate and then I checked the land trust files with the Internal Revenue Service.

BY MR. CUSHNER:

Q The Internal Revenue Service maintains land trust files?

A They maintain identity of land trust files submitted to them by the banks.

Q Do all the banks in the City of Chicago extend to the Internal Revenue Service the benefit of names of beneficiaries of land trusts?

MR. GONTRAM: I object, your Honor.

THE COURT: Objection sustained.

Did you find anything in your search of the IRS land trust files relative to this case?

THE WITNESS: Yes, sir. I found the name and identity of the land trust.

BY MR. CUSHNER:

Q How was that provided to the Internal Revenue Service?

A I assume by the bank.

MR. CUSHNER: Your Honor, I'd like to go into how exactly the IRS receives these records.

These records, under Illinois Law, are confidential. Land trust documents provide that they should not be [36] disclosed and I think we should have a right to inquire how the IRS, if this agent knows, how the IRS acquired these records.

THE COURT: Tell me first how it's relevant?

MR. CUSHNER: I think it's possible that these agents may have obtained this information from friendly officers of the bank and the summons would be invalid and not be enforced by the Court if this is true.

THE COURT: I don't agree with that. Seeing something under any circumstances is far different from a summons requiring its production and official disclosure. I don't think that's even an appropriate area of inquiry.

MR. CUSHNER: I think Powell v. United States, the Supreme Court case, has established the fact that if the information is already within the hands of the Internal Revenue Service it's not proper inquiry for the summons. Okay, I'll go on.

BY MR. CUSHNER:

Q Do you maintain memoranda of all interviews and meetings you conduct or attend with respect to these investigations?

A Correct, sir.

Q What particular violations of the IRS Code are you investigating with respect to Mr. Gattuso?

[37] A Investigation just to determine whether there is any violation.

Q At the present time you don't have any idea as to what section of the Code you might be looking at.

Are you trying to make a net worth case, specific item case, filing of false returns, filing of false statements, any conception of what you're looking for?

A Looking to see if there are any violations of the Internal Revenue Code.

Q With the informal testimony of the FBI records and the internal records of the IRS and the interviews then

you still have no idea what you're looking for, you still have not decided what violations may or may not have occurred?

A Did you ask me?

Q Is that correct?

A Well, sir, I'm attempting to determine whether or not there are any criminal violations of the IRS.

Q You mentioned that you had received from Mr. Lieberman a statement of financial condition authored by Mr. Gattuso.

Isn't it a fact that part of your investigation is trying to determine whether Mr. Gattuso perjured himself on that document?

A I have not looked into that matter at this time.

Q Have you considered that matter?

[38] A No, but I will.

Q Is the reason you haven't considered it, an agent with 16 years experience—you receive a financial statement and you didn't consider whether or not he may have perjured himself on it?

A Sure, I can't make judgment until I have all the facts.

Q And to gather the facts you must have some idea of which way the investigation is going, otherwise how do you know which facts to look for?

A The leads which we have developed based upon the information received will tell me whether or not Mr. Gattuso in fact did violate any criminal section of the Code.

Q Isn't it true that your own manual of procedures suggests that you try to focus in and find out what violations have occurred so that you don't go haphazardly around looking for information, but have a focus and direction of investigation.

Do you recall reading that in your manual?

A Absolutely.

Q Is there a Revenue Officer working with you in conjunction on this case?

A No, sir.

Q Is there a Revenue Agent with you working on [39] this case in conjunction with this case?

A No, sir, not at this time.

Q Do you recall having a meeting with myself, Mr. Perry, Special Agent Wilmonski and yourself in our office on July 11, 1975, I believe it was a Friday?

A I have a recollection, yes, sir.

MR. CUSHNER: Would you mark this as Respondent's Exhibit B.

(Whereupon, said document was marked as Respondent's Exhibit B for identification.)

BY MR. CUSHNER:

Q I show you what has been marked as Respondent's Exhibit B for identification, and ask you if you recognize this document?

A It looks familiar, yes, sir.

Q When did you see it?

A I think I saw this yesterday.

Q How did you happen to see it?

A It was handed to me.

Q By whom?

A I believe our group secretary.

Q Is she over the age of 18?

A Yes, sir.

Q Does she have any interest in this litigation?

[40] A No, sir.

Q Is this a subpoena duces tecum commanding you to be in this courtroom and to bring with you all investigative files, all memorandum, all correspondence and all other material that relate or concern John Gattuso?

A Yes, sir.

Q Did you bring those documents with you?

A Yes, sir.

Q Where are they?

A In my briefcase.

Q To your knowledge has a search warrant ever been issued in furtherance of any Federal investigation with respect to John Gattuso?

A Not to my knowledge.

Q To your knowledge has there been any postal surveillance of the taxpayer or any parties related to the taxpayer?

A Not to my knowledge.

MR. CUSHNER: I have no further cross examination of this witness.

I would like to move into evidence Respondent's Exhibit B and Respondent's Exhibit A into evidence at this time.

THE COURT: A and B may be admitted.

[41] (Whereupon, Respondent's Exhibits A and B previously marked for identification were received in evidence.)

THE COURT: Do you have any questions by way of clarification? I guess we call this cross examinations and your questions clarify questions.

Do you have anything, counsel?

MR. GONTRAM: No, I do not.

THE COURT: You're excused, sir.

(Witness excused.)

MR. GONTRAM: Your Honor, I would like to move into evidence Government's Exhibits 1 and 2.

THE COURT: They're attached to the petition. In any event, they may be admitted.

(Whereupon, Government's Exhibit Nos. 1 and 2 previously marked for identification were received in evidence.)

THE COURT: Do you have any other witnesses?

MR. CUSHNER: I'm not putting on the Government's case.

THE COURT: I'm sorry, I keep shifting the burden of proof unwittingly.

Do you have any other witnesses?

MR. GONTRAM: No.

THE COURT: Do you have anything you would like [42] to put on?

MR. CUSHNER: Yes, I'd like to call to the stand Special Agent Olivero.

JOHN F. OLIVERO,

called as a witness by and on behalf of the Respondent herein, having been previously duly sworn, was examined and testified further as follows:

THE COURT: Do you understand, Mr. Olivero, that you continue to testify under oath?

THE WITNESS: Yes.

THE COURT: Go ahead, Mr. Cushner.

DIRECT EXAMINATION

BY MR. CUSHNER:

Q Mr. Olivero, pursuant to subpoena served upon you today you brought all the files and records we've asked you to bring and they're in your briefcase.

May we have them at this time?

MR. GONTRAM: Your Honor, the Government objects to the production of those documents. This is the exact precise documents called for in the same subpoena served upon Mr. Olivero where the Government objected to the production of documents and the Government continues to object to this discovery technique in a proceeding of this sort.

It's clear in this Circuit, as well as virtually [43] every other circuit in this country, that documents in discovery of this nature is only permitted after the hearing that we are holding today and only if the respondent is able to raise a substantial question concerning the validity of the summons. The Government submits that no question has been raised at this point concerning the validity of this summons.

MR. CUSHNER: Your Honor, I believe the cases to which counsel would refer to, which I believe only exist in three circuits, refer only to the deposition discovery.

We served Special Agent Olivero with a trial subpoena. I don't think there's any case that I've been able to discover that would deprive a respondent of being able to serve a trial subpoena on a witness.

MR. GONTRAM: I believe that United States v. Turner, a case in this Circuit, does speak to that question, or at least the facts are similar to that question.

In any event, this attempt to subvert the holding of the Circuit Court in this case would be clearly improper and it's essentially the exact same thing.

THE COURT: I think the logic which compells the Court's discretion in discovery is equally compelling in instances of the trial.

[44] Unless you have sustained the burden, or reached the threshold of proof after the presentation of your case that suggests that the records should be gone into, at which time I would take them in for an in camera inspection and decide where we went from there. But, on the evidence that you put in, or that we've heard thus far, I haven't heard any such showing.

Do you have any other evidence, Mr. Cushner?

MR. CUSHNER: Yes, I think we'll excuse Agent Olivero and I'd like to call Mr. Gregory Perry.

GREGORY J. PERRY,

called as a witness by and on behalf of the Respondent herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUSHNER:

Q Would you give us your name for the record.

A Gregory Perry.

Q Could you tell me what your occupation is, Mr. Perry?

A I'm an attorney.

Q Where are you employed?

A The firm of Pederson & Houpt.

Q Do you have an area of specialization?

A I specialize in primarily Federal taxes.

[45] Q Calling your attention to June 11, 1975, do you recall attending a meeting with John Olivero?

A Yes, I do.

Q If John Olivero was in the courtroom could you identify him?

A Yes.

MR. CUSHNER: Let the record show that the witness has pointed out Special Agent Olivero, who earlier testified.

THE COURT: The record may so reflect.

BY MR. CUSHNER:

Q Calling your attention to that meeting of June 11, 1975, could you tell me who was present at that meeting?

A John Olivero, another agent, Special Agent Wilmonski, yourself and myself were there.

Q Do you recall what the subject matter of that meeting was?

A The subject matter was an investigation being conducted by Mr. Olivero regarding Mr. Gattuso.

Q Why were you present at the meeting?

A Our firm was retained by Mr. Gattuso to represent him in this investigation.

Q To the best of your recollection what, if anything, did you say or did they say to you?

A At the meeting we discussed the nature of the [46] investigation, which Mr. Olivero was conducting at the time, and I asked him what civil aspect of the investigation he was getting into and he said his investigation was strictly related to criminal violations of the Internal Revenue Code. I also discussed with him the nature of these criminal violations and at the time he was unwilling to disclose them; and I also asked him if there was a joint investigation and whether there was any Revenue Agent or officer assigned to the case with him and he said no, strictly a criminal investigation. That basically concluded our meeting at that time.

Q Does that exhaust your recollection of that meeting?

A Basically, yes.

MR. CUSHNER: I have no other questions of the witness.

THE COURT: Any cross, counsel?

MR. GONTRAM: Yes, your Honor.

CROSS EXAMINATION

BY MR. GONTRAM:

Q Mr. Perry, your firm represents Mr. Gattuso, is that correct?

A That's correct.

Q You also represent LaSalle National Bank?

A That's correct.

[47] Q In this proceeding?

A That's correct.

Q Do you see any conflict of interest in that situation?

MR. CUSHNER: Objection, your Honor.

THE COURT: If there is and I don't see it at this moment, this isn't the time to go into it. It's not relevant to this issue.

Go ahead.

BY MR. GONTRAM:

Q Is there an individual in your firm by the name of Sheldon Dickenson?

A No, sir.

Q Is there an individual in your firm by the name of Sheldon Davidson?

A Yes, sir.

Q Have you discussed this case with him?

A Certainly, the procedural aspects of it.

Q You have not discussed any substantive matters concerning this case with Mr. Davidson?

A No, we don't know what the substantive matters are.

Q Well, you have discussed the case then?

A Yes.

Q Are you aware of Mr. Davidson's former position [48] before he became a member of your firm?

A Yes, I am.

Q What was that?

A He was chief of the Chicago Strike Force.

Q And did Mr. Davidson—was Mr. Davidson involved in any way with Mr. Gattuso while he was a member of the Strike Force?

A I have never discussed that. He may have been.

Q He has never stated that to you that he was?

A No. At the time we decided to represent Mr. Gattuso we did contact the present U.S. Attorney as to whether there would be any problem because Mr. Davidson is a member of our firm, and we asked for—we wrote a letter to him and we got a response from the U.S. Attorney that said there would be no problem.

MR. GONTRAM: I have no further questions.

MR. CUSHNER: I have some redirect, your Honor.

Would you mark this as Respondent's Exhibit C for identification.

(Whereupon, said document was marked as Respondent's Exhibit C for identification.)

REDIRECT EXAMINATION

BY MR. CUSHNER:

Q Mr. Perry, do you recall what position Mr. [49] Davidson held while he was employed by the Department of Justice?

A I believe he was chief of the strike force.

Q I show you what has been marked as Respondent's Exhibit C, and ask you if you've ever seen that before?

A Yes, I have.

Q Would you identify Respondent's Exhibit C for us, please?

A It's a letter dated June 25, 1975 from Mr. Peter Vira, who succeeded Mr. Davidson in that position.

Q Could you read the letter to us, please?

MR. GONTRAM: I object.

MR. CUSHNER: Your Honor, he raised the issue that there is a possible conflict of interest and Mr. Davidson is employed by our firm, and I think it's only fair that we get into the correspondence between our firm and the Department of Justice.

THE COURT: I assume that the correspondence puts the question to rest and I hereby make a finding that there's no conflict of interest in this case.

Let's go on to something else.

MR. CUSHNER: I have no further questions of the witness.

THE COURT: Anything else, counsel?

MR. GONTRAM: No, your Honor.

[50] THE COURT: You're excused, sir.

(Witness excused.)

THE COURT: Is there anything else, Mr. Cushner?

MR. CUSHNER: No, I have no further witnesses.

THE COURT: Do you have anything by way of rebuttal?

MR. GONTRAM: No.

THE COURT: It's rather late, but I'd like to hear very briefly the argument on either side.

Tell me why you think I should enforce this summons, and I'll rehear Mr. Cushner in response. The matter has been uncluttered and uncomplicated and therefore the argument need not be long.

MR. CUSHNER: I think there's an initial argument as to whether or not sufficient evidence has been adduced which would allow us to depose the agent. If we're getting into the facts as to whether or not the summons should be enforced, the respondent would very much like to file briefs on the subject.

THE COURT: You're right, this hearing grew out of the long controversy over whether Mr. Olivero should be deposed and whether you could make some threshhold showing.

MR. CUSHNER: I think that could be occupied.

THE COURT: All right. We can handle that issue briefly in any event.

[51] MR. CUSHNER: We would like to file briefs as to the remaining issue. We'd like to be able to file a brief with respect to the issue.

THE COURT: Let's dispose of the issue of whether Agent Olivero should be submitted to deposition, which he virtually did a few minutes ago.

MR. GONTRAM: That's correct, and it's the Government's position that Agent Olivero was on the stand for a substantial period of time and that to allow his deposition at this point to be taken would simply be to delay the proceeding, which could serve no purpose for respondent to argue that he's being denied any privilege that he would otherwise be entitled to, I submit is not and would not be consistent with what has gone on in this hearing today.

Substantial cross examination has been conducted and no questions, really, have been raised. Certainly when a man, when counsel seeks to investigate and to inquire into the details of an investigation, certainly there may be individual items that he would say well, I want to look into that, that may disclose something or I want to look into this context, that may disclose something. But, the test, as the Courts have set forth, and I refer specifically to the case United States v. Turner in the Seventh Circuit and the United States v. National State Bank in the Seventh Circuit, the question is whether or [52] not a substantial question has been raised.

In the Turner case there was an introduction into evidence of a remark having been made to the taxpayer that was under investigation. That remark was to the effect that if we get any—that the Government would try to indict the taxpayer if the summons turned up any indication of illegal activities. The Court stated that this remark fell short of indicating that the Government's only purpose was to obtain evidence against him for use in a criminal proceeding.

Of course, that is the question, whether the summons has only the single purpose for us in a criminal proceeding, or whether there is any possibility of a civil aspect to the summons.

Agent Olivero testified that there was a civil purpose, that he has not even computed any tax liability and on cross examination this was made abundantly clear that this investigation is no where near being concluded.

Certainly on the direct and cross examination of Agent Olivero it's clear that the information sought by the summons does have a civil purpose, that does relate to

a civil tax liability of the taxpayer and that Agent Olivero is trying to ascertain whether certain income was correctly reported, whether those amounts are correctly reported and that he must obtain testimony and the documents [53] from the LaSalle National Bank to make that determination and calculation; and that nothing he has said, notwithstanding the attempt to engage in a discovery through the entire investigation, nothing he has said is to take away from the fact.

THE COURT: Mr. Cushner, any response?

MR. CUSHNER: I think counsel has hit upon some issues that may go to the final issue as to whether the issue before the Court right now is whether or not a question, enough of a question exists to allow us to inquire in the deposition of the agent what the purpose and nature of the investigation is and whether or not the Court should examine in camera the files of the IRS.

I did spot the characterization given by opposing counsel, I never, during either direct or cross examination, ever heard the word civil ever used by Agent Olivero. I believe the only thing Agent Olivero testified as being confused to is as to which particular criminal sanction he intended to investigate and finally recommended against our client.

I think it's quite clear that the only thrust of this investigation is criminal and I think we should have a right to go into the records of the Internal Revenue Service, at least those which the Court would find proper to disclose to us, and I think we have a right to further [54] develop this theory and I think it's been adequately established, certainly on direct if not on cross examination, that the sole purpose of this investigation is a criminal one. No where has it been established that Agent Olivero has any intent, any purpose, any design, any plan to attempt to find any civil violation whatsoever as against the taxpayer here involved.

In view of that, I respectfully request that we be given the right to examine Mr. Olivero in deposition and that the Court examine in camera the records of the Internal Revenue Service.

THE COURT: To finish your syllogism, Mr. Cushner, assume that the records reflect that the Olivero investigation is criminally based, and I am in agreement with you that he didn't say anything in his testimony about civil tax liability, what are the consequences of that? Are they inevitable in your mind?

MR. CUSHNER: I think it's inevitable. I think all the cases, especially the most recent cases, that the language of issued in good faith and to determine the civil tax liability is the burden that the Government must carry if there to ask the Court to use its process to enforce the summons.

The purpose of issuing a summons is to determine the civil tax liability and in every other case I have [55] ever seen in which the agents submits an affidavit to the Court he refers to civil tax liability. No where in the affidavit of Agent Olivero, which has been submitted, although it wasn't introduced in the testimony—it's part of the record as being attached to his petition—he doesn't refer to a civil tax liability, he refers to the tax liability and he doesn't do anything but state on the stand that he's running a criminal investigation.

I think it's clear under Donaldson that it's possible for the Internal Revenue Service to issue summons in good faith and for the purpose of determining civil tax liability if a special Agent is running criminal investigations. When they come in here and seek the enforcement of the summons, there's a joint investigation, there's a Special Agent working with a Revenue Agent, the purpose of which is to divide and distinguish between the various duties. I don't think the Turner case has said anything different. I think even if a Revenue Officer finds anything criminal he'll ask for a Special Agent and if they find anything they'll ask for an indictment.

The Special Agent has testified without qualification that this is a criminal investigation and this is precisely what a summons may not be issued for. The question goes to whether the Court is being asked to abuse its process to [56] enforce this summons. This summons is not to determine his civil liability nor has it been issued in good faith.

THE COURT: I'd like to hear your response on that issue. Really the case isn't so complicated that we have to bifurcate it into several trials. What's your answer to that? Do you agree with the legal conclusions of Mr. Cushner that if I were to make a finding that this was ab initio or forever a criminal investigation, that this summons would be unenforceable?

[57] MR. GONTRAM: Absolutely not. The law is that if there is no civil purpose to the summons that the summons would be invalid. Not that there is a criminal purpose to it, because obviously when any special agent issues a summons there is a criminal purpose to that summons.

The Supreme Court specifically stated in Donaldson that they would not draw a line when a special agent enters a case. Mr. Cushner would have the Court rule that simply because a special agent is in this case and has issued a summons that this summons is invalid.

Certainly the Government admits that this is an investigation that has possible criminal implications there is no doubt about that; and there is no doubt that the Supreme Court was aware of that fact in Donaldson.

In United States v. Awerkamp, a 7th Circuit case cited at 497 F 2d. 832, the Court addressed this issue and that is criminal purpose. Quoting from Donaldson, the Court states at page 834:

> "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct up until the point where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution."

The Court then said:

[58] "This point is reached when a recommendation for criminal prosecution is made." It's clear that that point has not been reached in this case.

Furthermore, the mere fact that there is no revenue agent in this case does not affect or in any way change the result reached by the 7th Circuit in Awerkamp or the Supreme Court in Donaldson.

THE COURT: Were there revenue agents in those two cases—if you remember the facts well enough.

MR. GONTRAM: It's not—I would think that there was a revenue agent.

MR. CUSHNER: Awerkamp was a pro se petition and the case is United States of America and L.J. Marberry Revenue Agent, not special agent.

MR. GONTRAM: So it's clear that there was in Awerkamp—I could not state for certain in Donaldson if there was or wasn't—but I would even contend that there was a revenue agent.

I would cite the Court a case, United States v Fisher, cited at 500 F 2d. 583, which the Court clearly stated in its recitation of facts that it was only a special agent involved in that case. Again, the Court in its conclusion is holding that there was no—that this in and of itself did not affect the validity of the summons [59] and states:

> "If we were to accept taxpayer's argument we would be drawing a line where a special agent appears, a line which the Court in Donaldson expressly refused to draw. Both in DeGrosa and Erdner we refused to hold that such evidence, in itself, satisfied the taxpayer's burden of proof. We reaffirm those holdings today."

Those holdings and the holdings of the Supreme Court both are based on the fact that a special agent, while he is investigating a case, that is up until the case is closed and a recommendation for criminal prosecution is made, has several options. He can recommend that criminal prosecution be made, but he also can recommend for civil liability, if that is all the evidence discloses.

So it's clear that this investigation is not ended and it's also clear that an investigation, that a summons may be issued where the primary purpose of that summons is to further a criminal—to obtain evidence in a criminal prosecution.

It has been held by the 6th Circuit in United States v Held—and again the primary focus is whether or not there is a civil—any civil purpose to the [60] summons and not whether there is any criminal purpose.

THE COURT: Isn't it true that any criminal investigation—that in any criminal investigation there's always a probability of civil tax liability and therefore under your theory any criminal investigation would not really be one until they closed it because there was always a possibility of a civil liability.

MR. GONTRAM: Until there is a recommendation for criminal prosecution, that is correct.

THE COURT: That's the position that you take. But until Agent Olivero makes his recommendation we don't know whether this was a totally criminal case because there might have been civil liability discovered.

MR. GONTRAM: That is correct, your Honor.

THE COURT: Gentlemen, let say that first that I'll decline to order the submission to deposition by Agent Olivero.

I'd also like to see, for in camera inspection, the investigative file he brought to Court in response to the taxpayer subpoena.

Now, if you gentlemen would submit to me—and I don't need elaborate briefs—a list of the authorities used in your argument I'll rule on the motion to enforce.

[61] As I said, it doesn't seem to warrant making any more production out of it than that. You'll submit the file to me for in camera inspection and I will then bundle it up in such a way to preserve it for the Court of Appeals for whichever side wants to use it, or make some arrangements to do so.

Based on the case authorities cited to me, which cases I'll read, I'll decide the petition for the enforcement of the Internal Revenue summons based on the finding I make as to whether this was a manifestly and exclusively criminal investigation or whether it has a civil purpose.

MR. CUSHNER: We would only like time in order to have a transcript available to the Court. We ordered it and we will require it in any event. I think that is important because of the nature of at least part of the brief we will submit to your Honor, and I think it's important to indicate that the Government's case went in as evidence and I would like to have that available to the Court.

THE COURT: I'll say now that I heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind.

There may be something, however, in his [62] notes, reports, memoranda, etc., or it may be that it doesn't make any reference of whether he thought of it. But as long as there was a possibility that information regarding civil tax liability might come up, that it was a civil investigation until he closed it.

If that's the law, you're in trouble, Mr. Cushner.

MR. CUSHNER: I agree with you. I think though that your Honor hit the nail on the head. It would be impossible to have a criminal indictment come out with respect to an income tax violation if there wasn't a penalty or tax due.

THE COURT: I accede to your suggestion, and it's a reasonable one, that you be allowed to look at the transcript and write a brief memorandum.

Let's assume you've heard all from Agent Olivero by way of discovery you're going to hear, and I think you've got virtually everything you're going to get from a deposition in any event; and therefore I would not order his submission to deposition and I'll undertake the in camera inspection at the same time that you file memos on it.

How much time do you gentlemen need to file a brief memorandum? You understand that on the issues I [63] have your positions clearly stated.

Now, unless I find something in the in camera inspection that gives more support to the Government position than the Agent's testimony did, it would be my conclusion that he was at all times involved in a criminal investigation, at least in his own mind. If you're right, that doesn't make any difference because he didn't close it out yet. If you're wrong then you're going to lose.

I think it boils down to an issue of law so it's the cases really that I'm interested in plus any further clues I may find in the in camera inspection of the investigative file.

What were you going to suggest, Mr. Cushner, on the time?

MR. CUSHNER: I assume the Government will be filing first brief. As long as the transcript is available to me I would be happy to reply to the Government's brief within ten days of its submission to me.

THE COURT: How about together?

MR. GONTRAM: Why not.

THE COURT: Could we have a simultaneous brief in ten days?

MR. GONTRAM: Fine.

THE COURT: I'll give you a little more time if you need it.

[64] Now, let me see where ten days brings us to—let's make it December 17th, that's the middle of the week before Christmas and that will give you a little more time. I'll receive the briefs by that time; you'll have your transcript.

In the meantime will you make some arrangements to have the Agent leave his investigative file with the Clerk and I'll look at that.

Thank you gentlemen, good night.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

[65] IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled cause before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on December 5, 1975, were caused to be reported in shorthand by me; and the foregoing transcript, consisting of Pages 1 to 64, inclusive, is true and correct.

ANTHONY W. LISANTI,
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received Dec. 29, 1975, H. STUART CUNNINGHAM, Clerk,
United States District Court]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

MEMORANDUM OF PETITIONERS

This proceeding was commenced by petitioners to judicially enforce two Internal Revenue summonses served upon the respondent, LaSalle National Bank. On December 5, 1975, a hearing was held on the Court's order to show cause why the respondent should not be compelled to obey the summonses, on the petitioners' motion for a protective order and motion to quash subpoena served upon petitioner, Special Agent John F. Olivero, and on the respondent's motion to dismiss. The Court ruled that Special Agent Olivero need not submit to deposition (Transcript ("Tr.") 62), but that it would inspect Agent Olivero's files "*in camera*" (Tr. 62), and denied respondent's motion to dismiss. (Tr. 4.) Two witnesses, Special Agent Olivero and Gregory Perry, appeared and testified at the aforesaid hearing. The testimony disclosed that the investigation by Special Agent Olivero concerning the possible tax liabilities of John Gattuso has not been completed (Tr. 11), that neither a "preliminary investigative report" (Tr. 27), nor a recommendation for criminal prosecution (Tr. 11-12), has been

made with respect to the investigation of John Gattuso, and that Special Agent Olivero has not determined in his own mind as to whether or not to recommend criminal prosecution in this case. (Tr. 12.) The purpose of the investigation was variously characterized by Special Agent Olivero as involving a determination of the tax liabilities of John Gattuso for the years under investigation (Tr. 6), and "to see if there are any violations of the Internal Revenue Code." (Tr. 37.) In keeping with Agent Olivero's duties as a Special Agent of the Intelligence Division of the Internal Revenue Service, the focus of his investigation was to "investigate the possibility of criminal violations of the Internal Revenue Code." (Tr. 6, 16-17, 37, 46.) Finally, one of the purposes of issuing the summonses to LaSalle National Bank was to check the accuracy of rental income reported by the taxpayer on properties held by LaSalle National Bank as trustee. (Tr. 7.)

DISCUSSION

It is clear that an Internal Revenue summons is enforceable if it is issued under circumstances where criminal indictment and prosecution are possibilities. *Donaldson* v. *United States*, 400 U.S. 517 (1971). A summons is also enforceable (i.e., it is issued for a proper purpose) notwithstanding that it is issued "principally to investigate for criminal liability," *United States* v. *Michigan Bell Tel. Co.*, 415 F. 2d 1284 (C.A. 6, 1969), or for the primary purpose of furthering a criminal tax investigation. *United States* v. *Held*, 435 F. 2d 1361 (C.A. 6, 1970). Accordingly, in order to sustain a defense that enforcement of the summons would be an abuse of the court's process, *United States* v. *Powell*, 379 U.S. 48, 58 (1964), the burden is upon the respondent to prove that there is no civil purpose to the summons. *United States* v. *Bell*, 448 F. 2d 40 (C.A. 9, 1971); *United States* v. *Moriarty*, 435 F. 2d 347, 349 (C.A. 7, 1970); *United States* v. *DeGrosa*, 405 F. 2d 926 (C.A. 3, 1969), *cert. denied sub nom.*, *Zudick* v. *United States*, 394 U.S. 973 (1969); *United States* v. *Michigan Bell Tel. Co.*, *supra*

at 1286; *Donaldson* v. *United States*, *supra* at 527 (burden of proof); *United States* v. *Powell*, *supra* at 58 (burden of proof); *United States* v. *Erdner*, 422 F. 2d 835, 836 (C.A. 5, 1970) (burden of proof).

It is submitted that the respondent has clearly failed to meet its burden of proving that enforcement of the summonses in question would constitute an abuse of the court's process. The evidence demonstrates that the purpose of the current investigation is to determine the tax liabilities of John Gattuso for the years 1970, 1971 and 1972. The investigation is not itself limited to a determination of possible criminal violations, although such is the focus of the investigation by Special Agent Olivero. However, it is quite clear that this "focus" does not affect the validity of the summonses. As stated by the Supreme Court in *Donaldson* v. *United States*, *supra* at 535-36:

> To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law.

The only evidence presented at the hearing in this case relating to a "criminal purpose" of the summonses was Agent Olivero's testimony (and his admission to Gregory Perry) concerning his duty to investigate possible criminal violations of the Internal Revenue Code. Not only is such evidence insufficient to establish the *sole* purpose of the summonses, but to hold the summonses unenforceable on this ground would be to "draw a line" upon the appearance of a special agent, a holding rejected by the court in *Donaldson*. Moreover, it is submitted that a valid civil purpose was affirmatively demonstrated by Special Agent Olivero's testimony that the summonses were issued to determine the correctness of rental income, reported by the taxpayer, on property held in trust by the respondent. Clearly, the correctness of such income has civil, and possibly criminal, ramifications. Agent Olivero's investigation of the taxpayer has not yet been completed and no recommendation for criminal prosecution has yet

been made. Even if the documents and testimony called for by the present summonses, plus any other data, fail to disclose criminal liability, such evidence would clearly be relevant to John Gattuso's civil tax liability. On the other hand, should a recommendation for criminal prosecution ultimately be made, the information called for by the summonses would still be relevant to a determination of John Gattuso's liability for civil tax fraud. As stated by the Court in *Boren* v. *Tucker*, 239 F. 2d 767, 772 (C.A. 9, 1956), a case involving the enforceability of a summons issued by a special agent:

> . . . the existence of the *possibility* of criminal prosecution does not necessarily mean that there *will* be criminal prosecution. The ultimate decision may be, (1) civil liability for the correct tax, (2) liability for the tax plus penalty, (3) criminal prosecution, or (4) both the penalty and the criminal prosecution.

The petitioners sought to introduce into evidence the possible results of an investigation by a special agent as noted by the court in *Boren* v. *Tucker*, *supra*. (Tr. 11.) Notwithstanding, petitioners submit that the Court may take judicial notice of the duties and responsibilities of John Olivero, as a special agent of the Internal Revenue Service, Intelligence Division. *United States* v. *Mercurio*, 418 F. 2d 1213, 1216 (C.A. 5, 1969), *aff'd sub nom.*, *Donaldson* v. *United States*, *supra*. Such duties and responsibilities are outlined in two recent decisions by the Seventh Circuit Court of Appeals. *United States* v. *Moriarty*, 435 F. 2d 347 (C.A. 7, 1970); *United States* v. *National State Bank*, 454 F. 2d 1249 (C.A. 7, 1972).

Although both cases involved joint investigation (i.e., a Revenue Agent from the Audit Division of the Internal Revenue Service and a Special Agent), the Court noted that the responsibilities of the special agent included "certain 'audit functions'." "[A]n audit of the tax liability would necessarily precede a recommendation by [the special agent] of criminal prosecution." *United States* v. *National State Bank*, *supra* at 1251. Furthermore, the special agent may recommend "that civil penalties for fraud be imposed without criminal prosecution, as the

facts warrant; [and] that the cooperating Revenue Agent is bound by the recommendations of the Special Agent with respect to civil fraud penalties." *United States* v. *Moriarty*, *supra* at 349.

In addition, respondent's counsel, at the hearing held in this matter, read Section 539 of the Handbook for Special Agents, Intelligence Division, Internal Revenue Manual Chapter 9900, (Tr. 32), in cross-examining Agent Olivero. The Court is respectfully referred to Section 536 of that document which states that in cases in which prosecution is not recommended, the special agent is responsible for recommendations concerning civil penalties.

The respondent may argue herein that in the investigation of John Gattuso a Revenue Agent has not been assigned to the case, and therefore, since only a Special Agent is presently conducting the investigation, the validity of the summonses is affected. It is clear, however, that case law does not lend any support for such an argument. Thus, *Donaldson* v. *United States*, *supra*, which enforced a special agent's summons served, as here, upon a third party witness, does not distinguish between a joint investigation and one conducted solely by a special agent. In *United States* v. *Fisher*, 500 F. 2d 683 (C.A. 3, 1974), however, it is clearly set out in the court's opinion that only the special agent was conducting the investigation and that no employee of the Audit Division of the Internal Revenue Service was participating therein. The court upheld the validity of the summons, stating that "[i]f we were to accept taxpayers' argument we would be drawing a line where a special agent appears, a line which the Court in *Donaldson* expressly refused to draw." 500 F. 2d at 688.

Finally, it is significant that in the present case no recommendation for criminal prosecution has yet been made. In discussing the importance of this fact on the issue of "improper purpose", the Seventh Circuit stated in *United States* v. *Awerkamp*, 497 F. 2d 832, 834-835 (C.A. 7, 1974):

> Respondent argues that the summons is being used for an improper purpose because the information being sought will be sued to recommend a criminal

> prosecution for a violation of 26 U.S.C. § 7203. In *Donaldson* v. *United States*, 400 U.S. 517, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971), the Supreme Court held that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" up until the point "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution . . ." This point is reached when a recommendation for criminal prosecution is made. 400 U.S. at 531-536. *Accord*, *United States* v. *Moriarity*, 7 Cir., 435 F. 2d 347, 349-350. There is not the merest suspicion in the record that a recommendation for prosecution had been made. The existence of a possibility of criminal prosecution does not make the summons unenforceable. *See United States* v. *Turner*, 480 F. 2d 272, 275 (7th Cir. 1973). [Footnotes omitted.]

In the present case, no recommendation for criminal prosecution has been made and respondent has clearly failed to meet its burden of establishing that enforcing the summonses would constitute an abuse of the Court's process.

CONCLUSION

For the foregoing reasons, the petition filed herein to enforce Internal Revenue summonses should be granted.

SAMUEL K. SKINNER
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 1975, a copy of the foregoing memorandum of petitioners was mailed, postage prepaid, to Matt P. Cushner, 180 North LaSalle Street, Suite 3400, Chicago, Illinois.

JOSEPH M. GONTRAM
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received Dec. 24, 9:45 AM '75, United States Attorney, Northern District, Chicago, Illinois]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO, SPECIAL AGENT, INTERNAL REVENUE SERVICE, PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG, VICE-PRESIDENT, LASALLE NATIONAL BANK, RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONS

On December 5, 1975 a hearing was held in the cause herein to determine whether the Summonses issued by Special Agent Olivero should be enforced. Following the hearing and the taking of evidence therein, the Court ordered the Petitioners and Respondents to file simultaneous briefs with respect to the question of whether a Summons issued by the Internal Revenue Service for the sole purpose of conducting a criminal investigation may be properly enforced by a District Court.

The transcript of the December 5, 1975 hearing contained several crucial pieces of testimony. During the direct examination of Special Agent Olivero by Mr. Gontram, the attorney for the Government, the following exchange took place.

Q. Mr. Olivero, would you describe your focus as a Special Agent in this investigation?

A. To investigate the possibility of criminal violations of the Internal Revenue Code. (Transcript, p. 6) [1]

During the cross-examination of Special Agent Olivero by Mr. Cushner, attorney for the Respondents, the following exchanges took place:

Q. Would you tell us when you were first assigned to investigate the tax liability of John Gattuso?
A. In May of 1975.
Q. Who gave you that assignment?
A. My supervisor.
Q. Who is your supervisor?
A. At that time it was Mr. John McDermott.
Q. What was the nature of your assignment?
A. To investigate the possibility of any criminal violations of the Internal Revenue Code. (Transcript, pages 16 & 17)
Q. With the informal testimony of the F.B.I. records and the internal records of the I.R.S. and the interviews, then you still have no idea what you're looking for, you still have not decided what violations may or may not have occurred?
A. Did you ask me?
Q. Is that correct?
A. Well, sir, I'm attempting to determine whether or not there are any criminal violations of the I.R.C. (Transcript, p. 37).
Q. And to gather the facts you must have some idea of which way the investigation is going, otherwise how do you know which facts to look for?
A. The leads which we have developed based upon the information received will tell me whether or not Mr. Gattuso in fact did violate any criminal section of the Code.
Q. Isn't is true that your own manual of procedures suggests that you try to focus in and find out what violations have occurred so that you

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[1] For the convenience of the Court all pages of the transcript cited in Respondents' Brief are attached hereto as Exhibit A.

don't go haphazardly around looking for information, but have a focus and direction of investigation? Do you recall reading that in your manual?

A. Absolutely.

Q. Is there a revenue officer working with you in conjunction with this case?

A. No, sir.

Q. Is there a revenue agent with you working on this case in conjunction with this case?

A. No, sir, not at this time. (Transcript, pages 38 and 39)

During direct examination by Mr. Cushner of Mr. Gregory Perry, the following exchange took place.

Q. Calling your attention to that meeting of July 11, 1975, could you tell me who was present at that meeting?

A. John Olivero, another agent, Special Agent Wilmowski, yourself and myself were there.

Q. Do you recall what the subject matter of that meeting was?

A. The subject matter was an investigation being conducted by Mr. Olivero regarding Mr. Gattuso.

Q. Why were you present at that meeting?

A. Our firm was retained by Mr. Gattuso to represent him in this investigation.

Q. To the best of your recollection, what, if anything, did you say or did they say to you?

A. At the meeting we discussed the nature of the investigation, which Mr. Olivero was conducting at the time, and I asked him what civil aspect of the investigation he was getting into and he said his investigation was strictly related to criminal violations of the Internal Revenue Code. I also discussed with him the nature of these criminal violations and at the time he was unwilling to disclose them; and I also asked him if there was a joint investigation and whether there were any Revenue Agent or Officer assigned to the case with him and he said no, it was strictly a criminal investigation. That basically concluded our meeting at that time. (Transcript, pages 45 and 46)

It should also be noted that the subjective impressions of the Court after hearing the testimony and observing the demeanor of the witnesses was to the effect that the investigation being conducted by Special Agent Olivero was a criminal investigation.

The Court: To finish your silligism, (sic) Mr. Cushner, assume that the records reflect that the Olivero investigation is criminally based, and I am in agreement with you that he didn't say anything in his testimony about civil tax liability, what are the consequences of that? Are they inevitable in your mind? (Transcript, p. 54)

The Court: Now, unless I find something in camera inspection that gives more support to the Government's position than the Agent's testimony did, it would be my conclusion that he was at all times involved in a criminal investigation, at least in his own mind." (Transcript, p. 63)

The United States Supreme Court in *Abel* v. *United States*, 362 U.S. 217 stated unequivocally the position of the Court with respect to the use of such administrative Summonses in the conduct of criminal investigations:

> "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States."

Supra at 226.

The Supreme Court has also dealt directly with the question of the use of a Summons in obtaining evidence

for use in a criminal prosecution. In *Reisman* v. *Caplin*, 375 U.S. 440 (1964) the court stated:

> "Furthermore, we hold that in any of these procedures before either the District Judge or United States Commissioner, the witness may challenge the summons on any appropriate grounds. This would include, as the Circuits have held, the defenses that the materials are sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 239 F.2d 767, 772-773, . . ."
>
> *Supra* at 449.

More recently the Supreme Court has once again dealt with the standards to which the Government is held with respect to the enforcement of such Summonses. In *Donaldson* v. *United States*, 400 U.S. 517 (1971) the Court stated:

> "We hold that under Section 7602 an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith *and* prior to a recommendation for criminal prosecution." (Emphasis added)
>
> *Supra* at 536.

The *Donaldson* case clearly requires that the Government not only issue the Summons prior to a recommendation for criminal prosecution, but further that said Summons be issued in good faith. The fact that both requirements must be met finds further support in the later Supreme Court case of *Couch* v. *United States*, 409 U.S. 322 (1973) wherein the Court noted in its footnote discussing the *Donaldson* case:

> "Donaldson cautioned only that the Summons be issued in good faith and prior to a recommendation for criminal prosecution. (citation omitted) Neither of those conditions is successfully challenged here." N. 8 *Supra* at 326.

It is apparent that the Court considers the requirements in the disjunctive and would hold the Government to meeting both standards.

In the cause herein the direct testimony of the Special Agent has been that no criminal prosecution has yet been recommended. It is equally clear, however, that the civil tax liability of the taxpayer, or any other proper determination that may be aided by a summons, is not the subject matter of this investigation. The testimony discloses that the investigation being conducted by the Special Agent is solely criminal in nature and only for the purpose of gathering evidence for a criminal prosecution. It is not the Respondents' position that the mere entry of the Special Agent renders a Summons invalid, nor is it the Respondents' position that an investigation such as the instant one conducted solely by a Special Agent renders the Summons invalid. Rather, Respondents suggest that the Government cannot and does not meet the requirement that the Summons be issued in good faith when the investigation is solely for the purpose of gathering evidence for use in a criminal prosecution.

To enforce the instant Summonses the Respondents suggest would be to clearly ignore the requirements enunciated in both *Donaldson* and *Couch*. It is not enough that a recommendation for criminal prosecution has not been made. The Summons must also have been issued in good faith.

Prior to the decisions in both *Donaldson* and *Couch* the Seventh Circuit was applying the standards enunciated therein. In *United States* v. *Moriarty*, 435 F.2d 347 (7th Cir., 1970) the Court stated:

> "The fact that the Summons was issued by the Special Agent does not preclude its enforcement. As long as the determination of civil tax liability is genuinely a purpose of the Summons, it will be enforced, as the Summons, or its enforcement does not become improper because it may also produce evidence warranting criminal prosecution. (citations omitted) Here the civil tax audit has not been completed, the inspection of the additional records is needed, and the continued access to the corporation's records is essential to a proper completion of the audit. There is no basis for a conclusion that the sole purpose of

the investigation, or the Summons is to obtain evidence for a criminal prosecution." *Supra* at 349.

Following the decision in *Donaldson* the Seventh Circuit in *United States* v. *National State Bank* v. *George Green, M.D.*, 454 F.2d 1249 (7th Cir., 1972) the Court stated in citing *Donaldson*:

> "The essence of the District Court's decision is that the Summons issued in an investigation of civil liability with a possibility of criminal prosecution, but with no criminal prosecution pending, and was accordingly issued in good faith, the record justifies the court's finding of those facts. And the pertinent rule of Donaldson validates the Summons which issued 'in good faith and prior to a recommendation for criminal prosecution'. (citation omitted) *Supra* at 1252.

Following the decision in the *National State Bank* case the Seventh Circuit decided the *United States* v. *Turner*, 480 F.2d 272 (7th Cir., 1973) which was cited by the Government in argument in support of their position. Although *Turner* dealt generally with the limitation of discovery in such actions, it did once again deal with the *Donaldson* decision.

> "Their testimony on the valid civil purpose of the investigation, as well as their representation that no prosecution, against Turner had been recommended, Donaldson v. United States (citation omitted) provided ample justification for the limitation of discovery." *Supra* at 276.

Most recently, the Seventh Circuit has dealt with the enforceability of such Summonses in the *United States of America* v. *Robert J. Awerkamp*, 397 F.2d 832 (7th Cir., 1974). This case involved a Summons issued by a Revenue Agent, not a Special Agent, against a pro se petitioner. There the court stated:

> "Respondent argues that the Summonses being used for an improper purpose because the information being sought will be used to recommend a criminal prosecution for a violation of 26 U.S.C. § 7203. In Donaldson v. United States (citation omitted) the Supreme Court held that: 'Congress clearly has authorized the use of the Summons in investigating what may prove to be criminal conduct.' Up until the point 'again where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution . . .'."
>
> *Supra* at 834.

If an investigation has reached the point where a recommendation for criminal prosecution has been made it becomes clear that the sole objective of the investigation is to obtain evidence for use in that criminal prosecution. Nevertheless, the recommendation for criminal prosecution is only indicia and not the sole standard for determining whether a summons has been issued in good faith. The court must focus on all the activities undertaken by a Special Agent to determine whether enforcement is proper. To ignore events prior to a possible recommendation could result, as in the instant proceedings, in a summons being enforced where the sole objective of the investigation is to obtain evidence for use in a criminal proceeding. Such reasoning is compelled by the two prong standard enunciated in both *Donaldson* and *Couch*, and by the facts in the instant case where the sole purpose of the investigation has been established by the direct testimony of the Special Agent.

The only reported Circuit Court of Appeals decision that is directly on point is the very recent case of *United States* v. *Thomas F. Zack*, 521 F.2d 1366 (9th Cir., 1975). The facts in *Zack* are similar to those that exist in the instant case. A Special Agent issued an Internal Revenue Service Summons to a third-party in aid of what was alleged to be a criminal investigation of the taxpayer. In *Zack* the Court below found that the previous issuance of a search warrant was sufficient to raise a non-rebuttable presumption that the investigation was solely criminal in nature and it therefore denied enforcement. The Court of Appeals reversed and remanded only on the basis that the issuance of a prior search warrant was not

conclusive as to the issue of whether the summons was issued solely for a criminal purpose and as such was not sure that the District Court had applied the proper test. Nevertheless, the opinion in that case fully supports the position taken by the Respondents in this cause.

> "An I.R.S. administrative summons may be issued pursuant to 26 U.S.C. § 7602 in furtherance of an investigation to ascertain correct Federal tax liabilities (citation omitted). Enforcement should be denied, however, if it is issued for an improper purpose such as solely in furtherance of a criminal investigation."
>
> *Supra* at 1367.

The Court also states in full accord with the Respondents' position that it is not necessary for a prosecution to be pending for the court to find the investigation to be for solely criminal purposes.

> "The Government argues that, as a matter of law, a court cannot find an investigation to be for solely criminal purposes unless a prosecution is pending. We disagree. It is true that an investigation after indictment may be deemed solely in furtherance of the criminal prosecution (citations omitted). The same would be true if a recommendation for criminal prosecution has been made. (citation omitted) But indictment or recommendation of criminal prosecution is not a prerequisite to a finding that an investigation is solely criminal. (citations omitted)
>
> The Government argues to the contrary, relying upon language in Donaldson v. United States, supra where the court stated that a District Judge should find an improper purpose and refuse to enforce an I.R.S. summons in 'the situation of a pending criminal charge or, at most, of an investigation solely for criminal purposes. (citations omitted) Properly interpreted, this statement does not require the limitation suggested by the Government. The disjunctive 'or' leaves no doubt but that the administrative summons should not be enforced if either: (1) there is a pending criminal charge, or (2) the investigation is solely for criminal purposes.

> However, in the final paragraph of Donaldson, the court stated that 'an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution'. (citation omitted) From this we conclude that even prior to a recommendation for criminal prosecution, an administrative summons should not be enforced unless it is issued in good faith. *We harmonize this 'good faith' requirement with the language disapproving the use of the summons in 'an investigation solely for criminal purposes' by concluding that the Government would not be in good faith if it uses an administrative summons solely for criminal prosecution purposes.* Thus, in this case, if the administrative summons was used solely for criminal purposes, it is not issued in good faith and is inpermissible. This is true even though there has been no recommendation for prosecution. (citations omitted) (Emphasis supplied.)

The Fourth Circuit has also followed the *Zack* reasoning. In *U.S.* v. *Charles Theodore*, 479 F.2d 749 (4th Cir., 1973) the court stated:

> "Only where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution will the purpose of a summons be said to violate the Fourth Amendment and enforcement be denied." *Supra* at 753.

More recently, the Third Circuit in *U.S.* v. *Lafko*, 520 F.2d 622 (3rd Cir., 1975) followed the reasoning in *Zack* and stated:

> "In opposition to the Government's attempt to enforce the Summons, intervener Rolle asserted that Internal Revenue was improperly using its Summons

power to obtain incriminating evidence for use in Mr. Rolle's prosecution—a purpose not authorized by 26 U.S. Code § 7602. The Supreme Court has recognized this 'improper purpose' defense as a ground for refusing to enforce an Internal Revenue summons. (citations omitted) Section 7602 permits the Internal Revenue Service to summon a taxpayer's records for the limited purpose of 'ascertaining the correctness of any return'. Internal Revenue has no authority to conduct a criminal investigation through the use of its summons power. (citations omitted) In this letter opinion of August 6, 1974, the District Judge rejected Mr. Rolle's contention that Internal Revenue issued the summons for an unauthorized purpose citing as his sole reason: '. . . this court is satisfied that although Rolle is under investigation for possible civil and criminal proceedings, the matter has not reached the stage where any decision has been made by the Justice Department to proceed.'

> Under these circumstances, 'it is clear that the defendant Lapko should be directed to comply with a summons issued by the Internal Revenue Service. (citation omitted)'. This application of the Donaldson standard is patently erroneous. A preceding Justice Department recommendation to prosecute is not the sine qua non for proving that an Internal Revenue summons was issued for an improper purpose. The District Judge apparently relied on the statement in the Donaldson opinion that an Internal Revenue summons is enforceable if issued 'in good faith and prior to recommendation for criminal prosecution'. (citation omitted) At a minimum, the District Judge's letter opinion ignores the question of good faith, a question entirely separate from whether or not a formal recommendation to prosecute had been made." *Supra* at 624, 625.

It is clear from the foregoing and from the testimony taken herein that the Internal Revenue Service is conducting a purely criminal investigation. The agent has stated directly on the stand that his only purpose and

that his assignment is to investigate the criminal tax liability of the taxpayer under investigation. The more possibility of civil tax liability, or any other proper purpose for which a summons may be issued, has nowhere been demonstrated by the Internal Revenue Service in the instant proceeding. In view of the foregoing authorities and the testimony herein it is respectfully suggested that the instant Summonses should not be enforced and that the action herein be dismissed with prejudice.

Respectfully submitted,

/s/ Matt P. Cushner
MATT P. CUSHNER,
Attorney for Respondents

Of Counsel:

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180 North LaSalle Street
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STATE OF ILLINOIS)
COUNTY OF COOK) ss.
)

AFFIDAVIT OF MAILING

MARY ELLEN KOZELUH, on oath, deposes and says that she has served the foregoing Respondents' Brief in Opposition to Enforcement of Internal Revenue Service Summons by mailing a copy to Mr. Stanley Kubacki at the United States Attorneys Office, 219 South Dearborn Street, Chicago, Illinois 60604 and has deposited the same in the U.S. mail before the hour of 5:00 p.m. on

December 23, 1975 at 180 North LaSalle Street, Chicago, Illinois with proper postage paid.

/s/ Mary Ellen Kozeluh
MARY ELLEN KOZELUH

Subscribed and Sworn to Before me this 23rd day of December, 1975.

/s/ Yolanda Howard
YOLANDA HOWARD
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

UNITED STATES OF AMERICA AND JOHN F. OLIVERO,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

vs.

LASALLE NATIONAL BANK AND JOSEPH W. LANG,
VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

RESPONDENTS' REPLY

The Memorandum of the Petitioners' filed herein deals briefly with the testimony of Special Agent Olivero. The memorandum directs the Court's attention to pages 6 and 37 of the transcript and indicates that the testimony found therein characterizes the investigation as involving "the determination of the tax liabilities of John Gattuso for the years under investigation" and "to see if there are any violations of the Internal Revenue Code". A reading of those pages would indicate rather, that the Special Agent is investigating "the possibility of criminal violations of the Internal Revenue Code" (Tr. 6) and that he is "attempting to determine whether or not there are any criminal violations of the I.R.S." (Tr. 37).

Petitioners' Memorandum also alleges that one of the purposes for the issuance of the Summonses herein was "to check the accuracy of rental income reported by the taxpayer on properties held by the LaSalle National Bank as trustee.". (TR. 7) The actual testimony on page 7 indicates that the taxpayer had filed income tax returns disclosing rental income from real property. The trust records held by the LaSalle National Bank could do nothing more than disclose the ownership of the beneficial interest of the land trusts. Ownership was already dis-

closed in the tax return of the taxpayer as indicated by the testimony of the Special Agent and the land trust records of the bank would be of absolutely no value in determining the correctness of the rental income derived from real property held by it in trust. It is clear that whatever the Special Agent's purpose might have been in issuing the Summons to the bank. it could not have been to check the accuracy of the rental income reported. The Bank is mere title holder and has no responsibilities for the operation of the property including the collection of rental income.

The Petitioners allege that their Summonses are enforceable notwithstanding the fact that they are issued "principally to investigate for criminal liability or for the primary purpose of furthering a criminal tax investigation". The Petitioners cite as authority, therefore, *United States* v. *Michigan Bell Telephone Co.*, 415 F.2d 1284, (Ct. of Appeals, 6th, 1969) and *United States* v. *Held*, 435 F.2d 1361 (Ct. of Appeals, 6th, 1970).

In *United States* v. *Michigan Bell Telephone Co.*, the case was tried on stipulated facts. Paragraph 6 of the stipulation indicated that the Michigan Bell Telephone Co. had refused to appear and produce the summoned records because the Internal Revenue Service had refused to assure Michigan Bell Telephone that the records demanded were unconnected with any criminal investigation. The Court then indicated that the mere fact the Internal Revenue Service refused to make such assurances to the telephone company was not sufficient to exclude the possibility that the Summons was also issued to determine a civil tax liability. Further, the Court indicated that the Commissioner of Internal Revenue would be entitled to enforcement of the Summons if the requirements of *United States* v. *Powell*, 379 U.S. 48 (1964), met. Although this case preceded the Supreme Court decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971) the Court in *Michigan Bell* also stated that it would have been an abuse of the Court's process to enforce the Summons were the Summons issued for an improper purpose reflecting on the good faith of the investigation.

Further, in *United States* v. *Held*, the Court in the recitation of the facts stated that the Summons grew out of a joint investigation being conducted concurrently by a Revenue Agent and Special Agent of the Internal Revenue Service. The Court indicated that the civil tax aspects of the case were at least co-extensive with the possibility of criminal action and this finding was apparently acquiesed in by the Appellant who raised on review the question of whether a Summons could be issued for the dual purpose of ascertaining both civil tax liability and the presence of criminal tax fraud. It is apparent that neither of these cases are authority for the service to issue a Summons in aid of a criminal investigation. Further, both cases predate the decision in *Donaldson, supra* which for the first time enunciated clearly the disjunctive standard of "'good faith" in the issuance of such Summonses.

The Petitioners state that the burden is upon the Respondents to prove that there is no civil purpose to the Summons. The Petitioners are correct in that the Respondents do carry the burden. The burden, though, is not to show that there is no civil purpose to the Summons, but rather that the enforcement of the Summons would be an abuse of the Court's process. Whatever burden the Respondents have was met at the hearing herein. The Court itself stated: "I'll say now that I heard nothing in Agent Olivero's testimony to suggest that the thought of a civil investigation ever crossed his mind." (TR. 61). Whether the Petitioners' burden can be said to rest on the *pre-Donaldson* standard of the showing that the Summons was issued for an improper purpose or to the *post-Donaldson* standard that the Summons was not issued in good faith, such burden has in fact been met.

The Petitioners argue that the mere presence of a Special Agent in an investigation does not render a Summons improper. The Respondents did not and do not argue that proposition. Petitioners do argue, however, that the "focus" of an investigation does have probative value with respect to the purpose of the investigation, as well as the "good faith" of the Internal Revenue Service in its issuance. The *Donaldson* case says nothing to the

contrary, but merely recites the proposition that the mere presence of a Special Agent does not render a Summons invalid.

The only evidence presented at the hearing relating to criminal purpose is not, as the Petitioners suggest, Agent Olivero's testimony concerning his duty to investigate possible criminal violations, but rather, his consistent and constant testimony that his purpose, his investigation, and finally his issuance of the Summonses herein were for the sole purpose of conducting a criminal investigation. The Court having heard and considered the testimony stated such, and to hold the Summons unenforceable would not be as the Petitioners allege, to draw a line upon the appearance of a Special Agent, but rather to refuse enforcement of a Summons that was issued for an improper purpose and not in "good faith".

The mere fact that the Petitioners assert that the duties and responsibilities of the Special Agent generally include certain audit functions, does not lead inescapably to the conclusion that every investigation conducted by a Special Agent is in furtherance of those responsibilities. If that were the case, as the Government now suggests, there would be no need for a hearing and certainly no need for cross-examination of the Special Agent. The Court could merely take judicial notice of these "duties and responsibilities" and enforce each and every Summons brought before it.

The Petitioners reliance on *United States* v. *Awerkamp*, 497 F.2d 832 C.A. 7th (1974) is clearly misplaced. In *Awerkamp* the Government was seeking to enforce a Summons issued by a Revenue Agent. The Court indicated in its opinion that the purpose of the Summons was to gather information for the completion of tax returns for 1970 and 1971 and that the Summons had been issued by a Revenue Officer in the Collection Division. As such the Summons was issued strictly in furtherance of a civil function of the Internal Revenue Service, the collection of a tax.

It should be noted that the Court dealt only with the standard enunciated in *Powell, supra*, i.e., was the Summons issued for an improper purpose.

The Court did indicate that a Summons may be used until the point when the sole objective of the investigation is to obtain evidence for use in a criminal prosecution. The Court also stated that this point is reached when the recommendation for criminal prosecution is made. Nevertheless, the Court no where indicated that the mere absence of such recommendation is sufficient to meet the standards set out in *Powell*.

It should also be noted that in view of the facts underlying the *Awerkamp* decision, i.e., the issuance of the Summons by a Revenue Officer in the Collection Division, there was no need to argue or decide the "good faith" standard as enunciated in *Donaldson*.

In view of the foregoing, and the previous Memorandum filed by Respondents herein, it is respectfully urged that the Petition filed herein to enforce the Internal Revenue Service Summons be denied.

/s/ Matt P. Cushner
MATT P. CUSHNER
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Of Counsel:

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STATE OF ILLINOIS)
COUNTY OF COOK) ss.
)

AFFIDAVIT OF MAILING

MARY ELLEN KOZELUH, being first duly sworn on oath deposes and says that she has mailed a true and correct copy of the foregoing Respondents' Reply to:

Mr. Stanley Kubacki
Asst. U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604

by depositing a copy of same with postage prepaid in the U.S. Mail at 180 North LaSalle Street, Chicago, Illinois 60601 on the 9th day of January, 1976.

/s/ Mary Ellen Kozeluh

Subscribed and Sworn To before me this 9th day of January, 1976.

/s/ Beth M. Walls
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 C 3842

[Received May 6, 1976, H. STUART CUNNINGHAM, Clerk, United States District Court]

UNITED STATES OF AMERICA AND JOHN F. OLIVERO, SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS,

v.

LASALLE NATIONAL BANK AND JOSEPH W. LANG, VICE-PRESIDENT, LASALLE NATIONAL BANK,
RESPONDENTS.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the UNITED STATES OF AMERICA appeals to the United States Court of Appeals for the Seventh Circuit from the Order of March 9, 1976, denying the petition of the United States of America and John F. Olivero, Special Agent of the Internal Revenue Service, for the enforcement of Internal Revenue summonses served upon the respondent, LaSalle National Bank.

SAMUEL K. SKINNER
United States Attorney

Notice Should Be Served Upon:

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353-8694

SUPREME COURT OF THE UNITED STATES

No. 77-365

UNITED STATES, PETITIONER,

v.

LASALLE NATIONAL BANK, ET AL.

ORDER ALLOWING CERTIORARI. Filed December 12, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

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